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O. W. SMITH
LAW BOOKS
122 N. BROADWAY
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ESSENTIALS OF THE LAW
IN TWO VOLUMES

VOL. 1 BLACKSTONE
VOL. 2 ELEMENTARY LAW

A REVIEW

OF

BLACKSTONE'S COMMENTARIES

WITH EXPLANATORY NOTES

FOR THE USE OF

STUDENTS AT LAW

SECOND EDITION

BY

MARSHALL D. EWELL, LL. D.,

LATE PRESIDENT AND DEAN OF THE KENT COLLEGE OF LAW OF CHICAGO;
AUTHOR OF "EWELL ON FIXTURES," ETC., ETC.

ALBANY, N. Y.
MATTHEW BENDER & COMPANY,
INCORPORATED.
1915.

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Fifth Printing
Printed in the United States of America

ESSENTIALS OF THE LAW.

ESSENTIALS OF THE LAW

PREFACE TO SECOND EDITION.

The first edition of this series was published in 1882. When the writer was first appointed Professor of Elementary Common Law in the Union College of Law of Chicago in 1876, it became his duty, among other topics, to instruct successive classes in Blackstone's Commentaries He found it necessary to study harder probably than his students, and it was his practice to read pen in hand and to underscore and annotate the important passages. With every succeeding year these distinguishing marks and notes were extended and elaborated, and formed the basis of the system of differentiation of the text, which is the distinguishing feature of this series. For twenty-seven successive years this work continued with successive classes. In making this revision the distinguishing features of the text have been retained. In addition thereto, since the writer no longer appears in person before classes of students with oral explanations, it has been thought advisable to supplement the text with explanatory notes, not merely for the purpose of fortifying the text by authority, but to take the place as far as possible of the former oral expositions and thus make the text more understandable. At the same time references have been made to such text books and leading cases as seemed best adapted to develop and amplify the text. Instead of appending a glossary at the end of the book, such terms as seemed to need definition or explanation have been dealt with either in the text or notes as they occurred, all new matter in the text being included within brackets, thus: [ ]. Maxims in foreign languages have been translated as they occurred. As the book is primarily intended for students, it has not been loaded down with cases, though it is believed that a reference to the elementary principles contained in this series with the authors and cases supporting them will be advantageous to every one interested in the study or practice of law. In the text,

notes, and interpolated books and chapters written by the author, will, it is believed, be found a comprehensive though brief review of the whole body of English and American customary law, including statutes which by reason of their all but universal adoption have become a part of the general law of the land. To make these separate books and chapters exhaustive would require a library; but enough has been given to give a general though brief review of the subjects treated; and the student is referred to more exhaustive treatises for further explanations.

It must be borne in mind that this work is essentially an elementary treatise upon the common law. Long experience leads the editor to the conclusion that the best preparation for a student is a thorough knowledge of the common law, as distinguished from statutes; and that to attempt to incorporate in this treatise modern statutes would be harmful to the best interests of the student.

In absence of statutes to the contrary, the common law everywhere furnishes the rule of decision; it also furnishes rules for the interpretation and construction of statutes. The common law is a creature of slow growth; whereas statutes are too often ephemeral, multifarious and not well considered. Always begin an investigation, therefore, with the common law as a starting point, and read the statutes thereafter. Defer a study of the statutes until acquainted with the common law. This has been the rule of those learned in the law from the time of Lord Coke down to the present. It has always been a rule of conduct with the writer to be as willing to impart instruction to students as the students themselves were willing to receive instruction. The study of law is at best difficult to the beginner; and he who expects to excell must be prepared to devote years of unremiting toil to its study. To remove some of the obstacles and to make the first years of the novitiate of the student more pleasant and profitable is the real object of these volumes.

MARSHALL D. EWELL.

Chicago, Illinois, January, 1915.

PREFACE TO FIRST EDITION.

Blackstone's Commentaries deservedly constitute in this country the first book of the course of legal study usually prescribed for students of the law. Probably, however, every student who reads Blackstone is embarrassed by his own inability to distinguish obsolete or unimportant matter from the vital and fundamental principles of the law, and therefore does not know what parts demand the most attention, in order to fix them in his memory, and what may be dismissed with a more superficial examination. The object of this Abridgment is to relieve that embarassment, and thereby to lighten his labor and economize his time by directing his energies to what seems most worthy of attention. This has been attempted by eliminating obsolete and unimportant matter, by displaying leading principles in heavy-faced type, and by printing the more important parts of the text in small pica, while matter of minor importance as a rule has been printed in brevier. Doubtless there will be some difference of opinion as to what is of more and what of less importance, and is this respect this work only expresses the opinion of the Editor,— formed, however, after considerable experience in instructing young men just beginning the study of law. It frequently happened throughout the work that obsolete matter was so interwoven with matter of present importance that the plan indicated above could not conveniently be pursued. In such cases the obsolete matter has been indicated by the word "obselete" inclosed within brackets. Matter merely historical has in some instances been considered so important to a proper understanding of the present state of the law as to deserve more than a passing notice; such matter has accordingly been printed in the larger type. The principal difficulty has been in deciding what to omit. A large amount of obsolete matter, and matter merely historical, explanatory, or argumentative, has been omitted, but it is

believed that everything important for the student to know has been retained. As a rule, the exact language of the Author has been preserved. Sometimes, however, mere verbal changes not affecting the sense have been made, in order to economize space. Great care has been taken to make no omission or alteration that would change the meaning of the text or render that meaning obscure, and matter entirely new is in every instance inclosed within brackets, thus: [ ]. The original paging has been indicated by figures in brackets placed at the end of the first complete sentence of each page of the Author appearing in this work. The notes of the Author and of previous editors have necessarily been omitted. To have retained them would have defeated the object of the volume. Occasionally, however, when thought necessary to explain a change in the law, to elucidate an obscure expression, or to direct attention to an authority throwing light upon the subject, a few words or a reference to an authority inclosed in brackets have been thrown into the text; but, for the reason already stated, no systematic attempt at annotation has been attempted. As Blackstone's Commentaries are perhaps the most important institutional work placed in the hands of students at law, more space has been devoted to them than will be given to any other work or subject in the series of which this forms the first volume. It is believed, however, that no more space has been given to the work of this Author than it justly deserves. To students pursuing their studies in an office, which in the majority of cases is equivalent to studying law alone, and to students in law schools when upon review or preparing for examination, it is believed that this Abridgment will prove especially serviceable; and it is principally for their use that its preparation has been undertaken. If it materially assists them in their labors, its purpose will have been accomplished.

MARSHALL D. EWELL.

Union College of Law of Chicago,
May 29, 1882.

BIBLIOGRAPHICAL NOTE.

In the preparation of the notes and citations of new authorities to this edition of Blackstone the main object has been to make the law of the text correct, easily accessible, and to afford references such that the student so desiring can pursue the subject farther. In our experience students do not as a rule read long notes. Where the proposition in the text is well settled law, nothing is to be gained by adding a long list of cases; a reference to an approved text book where the cases are collected is ample. We once heard an eminent lawyer well known on both sides of the Atlantic, rebuked by the court for citing cases to sustain a well-settled rule of law, the court remarking that "counsel might take it for granted that the court knew some law." In such a case, however, a student needs a start, i. e., a reference to some good text book where cases are collected. Very few propositions have been passed by without comment in some part of the book. If the rule stated in the text has been changed, the modern rule is stated with authorities. If the text has become obsolete it is so stated or altogether omitted. In some cases we have been obliged to refer to books not very accessible to the student, e. g., Wentworth's Pleadings (10 vols.), 1799, because the topic could not be found (with *precedents*) fully treated elsewhere. These old precedents in prohibition, *scire facias, mandamus, quo warranto*, etc., etc., are very instructive.

All foreign phrases have been translated where they respectively occur. Such a glossary as would be useful to a student would occupy more space than the whole volume or would be maddening to the student by reason of omissions. The student may need a Norman French dictionary, which is not readily accessible. Kelham's Norman French Dictionary will be found *reprinted* at the end of vol. 2 of Bouvier's Law Dictionary, 11th Ed., copyrighted in 1852, a book easily found.

Next to actually knowing the law, is to know where to find it. To teach the student elementary principles and where to direct his attention for details has been continually in our mind.

At the close of the volume will be found a collection of old precedents. These are very instructive and give a flavor of reality to matters valuable by reason only of their forming links in the chain of history connecting the modern to the older jurisprudence. Modern precedents can be found in every law office. When we were listening to the lectures of the Hon. Thomas M. Cooley in 1866-8, we remember his advising his listeners to study the 2d and 3d volumes of Chitty's Precedents, and this is still good advice. Remember that the law is unknown "to him who knoweth not the reason thereof," and we might add also the historical growth thereof.

THE EDITOR.

A TABLE OF ENGLISH REGNAL YEARS.

Sovereigns.	Beginning of Reign.	Length of Reign.
William I.	October 14, 1066	21 years
William II.	September 26, 1087	13 "
Henry I.	August 5, 1100	36 "
Stephen	December 26, 1135	19 "
Henry II.	December 19, 1154	35 "
Richard I.	September 3, 1189	10 "
John	May 27, 1199	18 "
Henry III.	October 28, 1216	57 "
Edward I.	November 16, 1272	35 "
Edward II.	July 8, 1307	20 "
Edward III.	January 25, 1327	51 "
Richard II.	June 22, 1377	23 "
Henry IV.	Sept. 30, 1399	14 "
Henry V.	March 21, 1413	10 "
Henry VI.	September 1, 1422	39 "
Edward IV.	March 4, 1461	22 "
Edward V.	April 9, 1483	.. "
Richard III.	June 26, 1483	3 "
Henry VII.	August 22, 1485	24 "
Henry VIII.	April 22, 1509	38 "
Edward VI.	January 28, 1547	7 "
Mary.	July 6, 1553	6 "
Elizabeth.	November 17, 1558	45 "
James I.	March 24, 1603	23 "
Charles I.	March 27, 1625	24 "
The Commonwealth	January 30, 1649	11 "
Charles II*	May 29, 1660	37 "
James II.	February 6, 1685	4 "
William and Mary	February 13, 1689	14 "
Anne.	March 8, 1702	13 "
George I.	August 1, 1714	13 "
George II.	June 11, 1727	34 "
George III.	October 25, 1760	60 "
George IV.	January 29, 1820	11 "
William IV.	June 26, 1830	7 "
Victoria	June 20, 1837	63 "
Edward VII.	January 22, 1901	9 "
George V.	May 6, 1910	— "

* Chas. II did not ascend the throne till May 29, 1660, but his regnal years are reckoned from the death of Charles I, January 30, 1649, so that the year of his restoration is styled the 12th year of his reign.

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BLACKSTONE'S COMMENTARIES.

INTRODUCTION.

SECTION I.

ON THE STUDY OF THE LAW.[1]

SECTION II.

ON THE NATURE OF LAWS IN GENERAL.

Law, in its most general and comprehensive sense, signifies a rule of action, and is applied indiscriminately to all kinds of action, whether animate or inanimate, rational or irrational. Thus we say the laws of motion, of gravitation, of optics, or mechanics, as well as the laws of nature and of nations. And it is that rule of action which is prescribed by some superior, and which the inferior is bound to obey.[2] [38]

1. This section, while very interesting, is omitted from this edition for the reason that the space can be more profitably occupied by other matter.

"Suggestions Concerning the Study of the Law," written by the late Honorable Thomas M. Cooley in 1870 and occupying 28 pages at the beginning of his edition of Blackstone's Commentaries, may here be read with profit by the student.

2. See criticisms of this passage in the article on Sir William Blackstone (9th Ed.), Encyclopaedia Brittanica. See, also, the learned notes of the late William G. Hammond, pp. 95-117, vol. 1, Introduction to Blackstone's Commentaries; Holland on Jurisprudence, 60; Maine's Early Hist. of Inst., 372; Maine's Anct. Law, ch. 5, p. 110; Wilson's Lect. on Law, vol. 1, pp. 65, 85, 89, 91.

But laws, in their more confined sense, denote the rules, not of action in general, but of *human* action or conduct; that is, the precepts by which man, a creature endowed with both reason and freewill, is commanded to make use of those faculties in the general regulation of his behavior. [39]

As man depends absolutely upon his Maker for everything, it is necessary that he should, in all points, conform to his Maker's will. **This will of his Maker is called the law of nature.** These [laws laid down by God] are the eternal immutable laws of good and evil, to which the Creator himself, in all his dispensations, conforms; and which he has enabled human reason to discover, so far as they are necessary for the conduct of human actions. [40] Such, among others, are these principles: that we should **live honestly [honorably], should hurt nobody, and should render to every one his due**; to which three general precepts Justinian has reduced the whole doctrine of law. In consequence of the mutual connection of justice and human felicity, the Creator has not perplexed the law of nature with a multitude of abstracted rules and precepts, referring merely to the fitness or unfitness of things, but has graciously reduced the rule of obedience to this one paternal precept, "that man should pursue his own true and substantial happiness." [41] This is the foundation of what we call **ethics, or natural law.**

This law of nature, being coeval with mankind, and dictated by God himself, **is of course superior in obligation to any other.** It is binding over all the globe, in all countries, and at all times: no human laws are of any validity[3] [*i. e.*

The doctrine that law is necessarily the command of a superior is condemned by early American jurists. See Hammond's Introduction to Blackstone, p. 112.

3. So long as the legislature has constitutional authority to enact a law, it is binding upon the courts, even though it violates what is regarded as the divine law. Courts will not, however, adopt such a construction unless compelled to do so by the clear words of the statute. See generally Austin on Jurisprudence (Eng. Ed.), p. 220 note; Holland's Jur., 34; Calder v. Bull, 3 Dall. 386; Fletcher v. Peck, 6 Cranch, 87.

in the forum of conscience], if contrary to this; and such of them as are valid derive all their force, and all their authority, mediately or immediately, from this original.

But, in order to apply this to the particular exigencies of each individual, it is still necessary to have recourse to reason, whose office it is to discover what the law of nature directs in every circumstance of life, by considering what method will tend the most effectually to our own substantial happiness. And if our reason were always clear and perfect, the task would be pleasant and easy; we should need no other guide but this. But every man now finds the contrary in his own experience; that his reason is corrupt, and his understanding full of ignorance and error.

This has given manifold occasion for the benign interposition of divine Providence, which hath been pleased, at sundry times and in divers manners, to discover and enforce its laws by an immediate and direct revelation. [42] The doctrines thus delivered we call **the revealed or divine law,** and they are to be found only in the holy scriptures.

Upon these two foundations, the law of nature and the law of revelation, depend all human laws; that is to say, no human laws should be suffered to contradict these. There are, it is true, a great number of indifferent points in which both the divine law and the natural leave a man at his own liberty, but which are found necessary, for the benefit of society, to be restrained within certain limits. And herein it is that human laws have their greatest force and efficacy; for, with regard to such points as are not indifferent, human laws are only declaratory of, and act in subordination to, the former.

As it is impossible for the whole race of mankind to be united in one great society, they must necessarily divide into many, and form separate states, commonwealths, and nations, entirely independent of each other, and yet liable to a mutual intercourse. [43] Hence arises a third kind of law to regulate this mutual intercourse, called **"the law of nations,"** which, as none of these states will acknowledge a superiority in the other, cannot be dictated by any, but depends entirely upon the rules of natural law, or upon

mutual compacts, treaties, leagues, and agreements between these several communities: in the construction also of which compacts we have no other rule to resort to, but the law of nature; being the only one to which all the communities are equally subject.

Municipal law is properly defined to be "a rule of civil conduct prescribed by the supereme power in a state, commanding what is right and prohibiting what is wrong."[4] [44] [This definition will be improved by omitting the words, "commanding what is right," &c.]

And, first, **it is a rule:** not a transient, sudden order from a superior to or concerning a particular person; but something permanent, uniform, and universal. It is also called a *rule,* to distinguish it from *advice* or *counsel,* which we are at liberty to follow or not, as we see proper, and to judge upon the reasonableness or unreasonableness of the thing advised: whereas our obedience to the *law* depends not upon *our approbation,* but upon the *maker's will.* It is called a *rule,* to distinguish it from a *compact* or *agreement,*[5] for a compact is a promise proceeding *from* us, law is a command directed *to* us. [45]

Municipal law is also "a rule **of civil conduct.**" This distinguishes municipal law from the natural, or revealed; the former of which is the rule of *moral* conduct, and the latter not only the rule of moral conduct, but also the rule of faith.

It is likewise "a rule **prescribed.**" Besides a bare resolution, confined in the breast of the legislator, without manifesting itself by some external sign, can never be properly a law. It is requisite that this resolution be notified to the people who are to obey it. But **the manner in which this**

4. See note on preceding page. Many acts of the legislature are in themselves clearly right, some are as clearly wrong in the forum of conscience, and many are in themselves indifferent in their moral quality. So long as the act is within the legislative authority, its moral quality is immaterial.

5. In American jurisprudence a statute may constitute a contract. See the leading case of Dartmouth College v. Woodward, 4 Wheat. 518. Many corporate charters are legislative contracts.

notification is to be made, is matter of very great indifference. It may be notified by universal tradition and long practice, which supposes a previous publication, and is the case of the common law of England. It may be notified, *viva voce,* by officers appointed for that purpose, as is done with regard to proclamations, and such acts of parliament as are appointed to be publicly read in churches and other assemblies. [46] It may lastly be notified by writing, printing, or the like; which is the general course taken with all our acts of parliament.[6] Yet, whatever way is made use of, it is incumbent on the promulgators to do it in the most public and perspicuous manner; not like Caligula, who wrote his laws in a very small character and hung them upon high pillars, the more effectually to ensnare the people. There is still a more unreasonable method than this, which is called making of **laws ex post facto** [after the deed]; when after an action (indifferent in itself) is committed, the legislator then for the first time declares it to have been a crime, and inflicts a punishment upon the person who has committed it.[7] All laws should be there-

6. No notification is necessary unless required by constitution or statute. The case of Mary and Susan, 1 Wheat. 58; The Ann, 1 Gall. 62.

7. "The old rule was that statutes, unless otherwise ordered, took effect from the first day of the session in which they were passed." Cooley's Const. Lim., §§ 155-156. "The present rule is that an act takes effect from the time when the formalities of enactment are actually complete under the constitution, unless it is otherwise ordered or unless there is some constitutional or statutory rule on the subject which prescribes otherwise." Id., § 156. In some of the states the constitutions fix the times when the acts shall go into effect. Id., §§ 156-158.

Every statute shall be construed prospectively and not retrospectively, unless such is clearly the intention of the legislature; and in some states there are constitutional provisions prohibiting retrospective legislation. As to the limitations upon the power of the legislature to enact retrospective laws, see generally Cooley's Const. Lim., § 369 *et seq.*

Art. I, sec. 9, cl. 3, U. S. Const., prohibits Congress from passing any bill of attainder or *ex post facto* law; and section 10 of the same article prohibits any state from enacting such laws. In Calder v. Bull, 3 Dall. 386 *ex post facto* laws were construed to include: (1) Every law which makes criminal an act innocent when performed and punishes such action; (2) or which makes its degree of criminality greater than it was when com-

fore made to commence *in futuro* [in the future], and be notified before their commencement; which is implied in the term "*prescribed.*" But when this rule is in the usual manner notified, or prescribed, it is then the subject's business to be thoroughly acquainted therewith; for if **ignorance**, of what he *might* know, were admitted as a legitimate excuse, the law would be of no effect, but might always be eluded with impunity.[8]

But farther: municipal law is "a rule of civil conduct prescribed **by the supreme power in a state.**" For legislature, as was before observed, is the greatest act of superiority that can be exercised by one being over another. Wherefore it is requisite to the very essence of a law that it be made by the supreme power. Sovereignty and legislature are indeed convertible terms; one cannot subsist without the other.

The only true and natural foundations of society are the wants and the fears of individuals. [47] Single families formed the first natural society, among themselves; which, every day extending its limits, laid the first though imperfect rudiments of civil or political society: and when it grew too large to subsist with convenience in that pastoral state, wherein the patriarchs appear to have lived, it necessarily subdivided itself by various migrations into more. Afterwards, as agriculture increased, which employs and can maintain a much greater number of hands, migrations became less frequent: and various tribes, which had formerly separated, reunited again; sometimes by compulsion and conquest, sometimes by accident, and sometimes perhaps by compact. But though society had not its formal beginning from any convention of individuals actuated by their wants and their fears, yet it is the *sense* of their weakness and imperfection that *keeps* mankind together, that demonstrates the necessity of this union, and that therefore is the solid and natural foundation, as well as the cement of civil society. And this is what we mean by **the original contract of society,** which, though perhaps in no instance it has ever been formally expressed at the first institution of a state, yet in nature and reason must always be understood and implied in the very act of associating together: namely, that the

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mitted; (3) or which changes the punishment and inflicts a greater punishment than could have been legally imposed when the act was committed; or (4) which changes the rules of evidence so as to warrant a conviction on less or different testimony than was required by the laws at the time the crime was committed.

8. This is universally the law.

whole should protect all its parts, and that every part should pay obedience to the will of the whole, or, in other words, that the community should guard the rights of each individual member, and that (in return for this protection) each individual should submit to the laws of the community; without which submission of all it was impossible that protection should be certainly extended to any. [48] For when civil society is once formed, government at the same time results of course, as necessary to preserve and to keep that society in order.

The political writers of antiquity will not allow more than **three regular forms of government**: the first, when the sovereign power is lodged in an aggregate assembly consisting of all the free members of a community, which is called a **democracy**; the second, when it is lodged in a council, composed of select members, and then it is styled an **aristocracy; the last,** when it is entrusted in the hands of a single person, and then it takes the name of a **monarchy.** [49] All other species of government, they say, are either corruptions of, or reducible to, these three.

In a democracy, where the right of making laws resides in the people at large, public virtue, or goodness of intention, is more likely to be found than either of the other qualities [wisdom and power] of government. Popular assemblies are frequently foolish in their contrivance and weak in their execution, but generally mean to do the thing that is right and just, and have always a degree of patriotism or public spirit. **In aristocracies** there is more wisdom to be found than in the other frames of government; being composed, or intended to be composed, of the most experienced citizens; but there is less honesty than in a republic, and less strength than in a monarchy. [50] **A monarchy** is indeed the most powerful of any, for, by the entire conjunction of the legislative and executive powers, all the sinews of government are knitted together and united in the hand of the prince; but then there is imminent danger of his employing that strength to improvident or oppressive purposes. Democracies are usually the best calculated to direct the end of a law; aristocracies to invent the means by which that end shall be obtained; and monarchies to carry those means into execution. And the ancients had in general no idea of any other permanent form of government but these three; for though Cicero declares himself of opinion, "*esse optime constitutam rempublicam quae ex tribus generibus illis, regali, optimo, et populari, sit modice confusa,*"[9] yet Tacitus treats this notion of a

9. The best constituted republic is that which is duly compounded of these three estates: the monarchial, aristocratical and democratical.

mixed government, formed out of them all, and partaking of the advantages of each, as a visionary whim, and one that, if effected, could never be lasting or secure.

But the British constitution[1] has long remained a standing exception to the truth of this observation. For as with us the executive power of the laws is lodged in a single person, they have all the advantages of strength and despatch that are to be found in the most absolute monarchy,—and as the legislature of the kingdom is entrusted to three distinct powers, entirely independent of each other: first, the king; secondly, the lords spiritual and temporal, which is an aristocratical assembly of persons selected for their piety, their birth, their wisdom, their valor, or their property; and, thirdly, the House of Commons, *freely chosen by the people from among themselves*, which makes it a kind of democracy,—as this aggregate body, actuated by different springs and attentive to different interests, composes the British parliament and has the supreme disposal of everything, there can no inconvenience be attempted by either of the three branches but will be withstood by one of the other two, each branch being armed with a negative power sufficient to repel any innovation which it shall think inexpedient or dangerous. [51] If ever it should happen that the independence of any one of the three should be lost, or that it should become subservient to the views of either of the other two, there would soon be an end of our constitution. [52] [The House of Commons is now in the ascendency, and still the constitution survives.]

As the power of making laws constitutes the supreme authority, so wherever the supreme authority in any state resides, it is the right of that authority to make laws; that is, in the words of our definition, *to prescribe the rule of civil action.* Farther, it is its *duty* likewise.

I proceed now to the latter branch of the definition: that it is a rule so prescribed, **"commanding what is right, and prohibiting what is wrong."**[2] [53]

Now in order to do this completely, it is first of all necessary that the boundaries of right and wrong be established and ascertained by law. And when this is once done, it will follow of course that it is likewise the business of the law, considered as a rule of civil conduct, to enforce these rights and to restrain or redress these wrongs. It remains therefore only to consider in what manner the law is said to ascertain the boundaries of right and wrong, and the methods which it takes to command the one and prohibit the other.

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1. In England Parliament is not restrained by any written constitution and is hence omnipotent. The term "constitution" will be further explained later on. In the United States and the several states there are limitations imposed upon legislation by written constitutions, the nature of which will be explained in another place.

2. See comments on this subject in notes *ante.*

For this purpose **every law may be said to consist of several parts:** one *declaratory*, whereby the rights to be observed and the wrongs to be eschewed are clearly defined and laid down; another *directory*, whereby the subject is instructed and enjoined to observe those rights and to abstain from the commission of those wrongs; a third *remedial*, whereby a method is pointed out to recover a man's private rights or redress his private wrongs: to which may be added a fourth, usually termed the *sanction*, or *vindicatory* branch of the law; whereby it is signified what evil or penalty shall be incurred by such as commit any public wrongs and transgress or neglect their duty. [54]

With regard to the first of these, the **declaratory** part of the municipal law, this depends not so much upon the law of revelation or of nature, as upon the wisdom and will of the legislator. The declaratory part of the municipal law has no force or operation at all with regard to actions that are naturally and intrinsically right or wrong. But with regard to things in themselves indifferent, the case is entirely altered. [55] These become either right or wrong, just or unjust, duties or misdemeanors, according as the municipal legislator sees proper for promoting the welfare of the society and more effectually carrying on the purposes of civil life. And sometimes, where the thing itself has its rise from the law of nature, the particular circumstances and mode of doing it become right or wrong as the laws of the land shall direct.

The directory stands much upon the same footing [as the declaratory]; for this virtually includes the former, the declaration being usually collected from the direction. The law that says, "Thou shalt not steal," implies a declaration that stealing is a crime. And we have seen that, in things naturally indifferent, the very essence of right and wrong depends upon the direction of the laws to do or to omit them.

The remedial part of a law is so necessary a consequence of the former two, that laws must be very vague and imperfect without it. [56] For in vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law.

With regard to the **sanction** of laws, or the evil that may attend the breach of public duties, it is observed that human legislators have for the most part chosen to make the sanction of their laws rather *vindicatory* than *remuneratory*, or to consist rather in punishments than in actual particular rewards. Of all the parts of a law the most effectual is the **vindicatory.** [57] The main strength and force of a law consists in the penalty annexed to it. Herein is to be found the principal obligation of human laws.

Interpretation of Laws. The fairest and most rational method to interpret the will of the legislator is by exploring

his intentions[3] at the time when the law was made, by *signs* the most natural and probable. [59] And these signs are either the words, the context, the subject-matter, the effects and consequence, or the spirit and reason of the law.

1. **Words** are generally to be understood in their usual and most known signification, not so much regarding the propriety of grammar as their general and popular use. **Terms of art** or technical terms must be taken according to the acceptation of the learned in each art, trade, and science.

2. If words happen to be still dubious, we may establish their meaning from the **context,**[4] with which it may be of singular use to compare a word or a sentence whenever they are ambiguous, equivocal, or intricate. [60] Thus the proeme, or **preamble,** is often called in to help the construction of an act of parliament. Of the same nature and use is the comparison of a law with other laws that are made by the same legislator, that have some affinity with the subject, or that expressly relate to the same point.

3. As to the **subject-matter,** words are always to be understood as having a regard thereto, for that is always supposed to be in the eye of the legislator, and all his expressions directed to that end.[5]

4. As to the **effects and consequence,** the rule is, that where words bear either none, or a very absurd significa-

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3. The real intention as expressed in the words of the act is the cardinal force in the interpretation of a statute. It also has a controlling effect in contracts, wills, etc. Reference will be made to the subject farther on under other topics.

4. Every written instrument, whether it be a statute, contract, will, etc., shall be so interpreted that the whole may stand if possible, rather than that any part should fail. Where there is an irreconcilable conflict of one part of a statute with a constitutional provision, if the part so in conflict is an essential part of the act, it may avoid the whole act. In the case of deeds the first deed or the first clause shall prevail in case of such conflict, while in the case of a will, the last will prevails.

It is to be remarked that the terms "interpretation" and "construction" are not synonymous. "Interpretation" refers to the meaning as derived from the words of the instrument. "Construction" includes not only this but its application to the facts of some case. See generally Dwarris on Statutes.

5. See the next preceding note.

tion, if literally understood, we must a little deviate from the received sense of them.[6]

5. But, lastly, the most universal and effectual way of discovering the true meaning of a law, when the words are dubious, is by considering the **reason and spirit** of it, or the cause which moved the legislator to enact it. [61] For when this reason ceases, the law itself ought likewise to cease with it.[7]

From this method of interpreting laws, by the reason of them, arises what we call **equity** [by which is not meant equity or chancery jurisprudence], which is thus defined by Grotius: "The correction of that wherein the law (by reason of its universality) is deficient." For since in laws all cases cannot be forseen or expressed, it is necessary that, when the general decrees of the law come to be applied to particular cases, there should be somewhere a power vested of defining those circumstances, which (had they been foreseen) the legislator himself would have expressed. And these are the cases which, according to Grotius, "*lex non exacte definit, sed arbitrio boni viri permittit.*"[8]

SECTION III.

OF THE LAWS OF ENGLAND.

The municipal law of England may be divided into two kinds: the *lex non scripta*, the unwritten, or common law; and the *lex scripta*, the written, or statute law. [63]

6. That is, so as to give them a rational rather than an absurd meaning.

7. But in the case of a statute unfortunately it does not become invalid until repealed by a subsequent statute. Customary or common law will be referred to later.

8. "The law does not exactly define, but leaves to the discretion of a good judge." A court has, however, no power to disregard the clear provisions of a statute; although great hardship in enforcing it may afford an argument that such was not the intention of the act. In a criminal statute such hardship or injustice may lay the ground for executive clemency.

The lex non scripta, or unwritten law, includes not only *general customs,* or the common law properly so called, but also the *particular customs* of certain parts of the kingdom; and likewise those *particular laws* that are by custom observed only in certain courts and jurisdictions.

The monuments and evidences of our legal customs are contained in the records of the several courts of justice, in books of reports and judicial decisions, and in the treatises of learned sages of the profession, preserved and handed down to us from the times of highest antiquity.[9] [64] However, I therefore style these parts of our law *leges non scriptae,* because their original institution and authority are not set down in writing, as acts of parliament are, but they receive their binding power and the force of laws by long and immemorial usage, and by their universal reception throughout the kingdom.

This unwritten or common law is properly distinguishable into three kinds: 1. General customs, which are the universal rule of the whole kingdom, and form the common law in its stricter and more usual signification. [67] 2. **Particular customs,** which for the most part affect only the inhabitants of particular districts. 3. **Certain particular laws,** which by custom are adopted and used by some particular courts, of pretty general and extensive jurisdiction.

I. **As to general customs, or the common law** properly so called, this is that law by which proceedings and determinations in the king's ordinary courts of justice are guided and directed. [68] This for the most part settles the course in which lands descend by inheritance; the manner and form of acquiring and transferring property; the solemnities and obligation of contracts; the rules of expounding wills, deeds, and acts of parliament; the respective remedies of civil injuries; the several species of temporal offenses, with the manner and degree of punishment; and an infinite number of minuter particulars, which diffuse

9. The law as administered in this country is contained principally in books of statutes, public and private, and digests thereof, in reports of adjudged cases and abridgments and digests thereof, and in text-books founded upon the statutes and reported cases.

themselves as extensively as the ordinary distribution of common justice requires.[1]

These customs or maxims are to be known, and their validity determined, by the judges in the several courts of justice.[2] [69] They are the depositaries of the laws, the living oracles who must decide in all cases of doubt, and who are bound by an oath to decide according to the law of the land.

Judicial decisions are the principal and most authorative evidence that can be given of the existence of such a custom as shall form a part of the common law. The judgment itself and all the proceedings previous thereto are carefully registered and preserved, under the name of **records,** in public repositories set apart for that particular purpose; and to them frequent recourse is had when any critical question arises, in the determination of which former precedents may give light or assistance.[3] **It is an established rule to abide by former precedents where the same points come again in litigation.**

This rule admits of exception where the former determination is most evidently contrary to reason; much more if it be clearly contrary to the divine law. [70] But even in such cases the subsequent judges do not pretend to make a new law, but to vindicate the old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was *bad law,* but that it was *not law;* that is, that it is not the established custom of the realm, as has been erroneously determined. The doctrine of the law then is this: that precedents and rules must be followed, unless

1. The English and American common law, which includes the law merchant, forms the greater part of the jurisprudence of most of the several states. See the remarks of Caton, C. J., in Cook v. Renick, 19 Ill. 602; also, Am. Bar Assn. Rep. 1889, p. 233; 1 Kent's Com., pt. 3, p. 471.

The Roman Civil Law forms the basis of the jurisprudence of the state of Louisiana. The United States, as distinguished from the several states, has no system of common law either civil or criminal.

2. The court responds to questions of law, the jury to questions of fact.

3. These judicial decisions in practice are to be found in the printed books of reports of the various courts.

flatly absurd or unjust; for though their reason be not obvious at first view, yet we owe such a deference to former times as not to suppose that they acted wholly without consideration.[4]

Reports are histories of the several cases, with a short summary of the proceedings, which are preserved at large in the record, the arguments on both sides, and the reasons the court gave for its judgment, taken down in short notes by persons present at the determination. [71] And these serve as indexes to, and also to explain, the records, which always, in matters of consequence and nicety, the judges direct to be searched. The reports are extant in a regular series from the reign of King Edward the Second inclusive, and from his time to that of Henry the Eighth were taken by the prothonotaries, or chief scribes of the court, at the expense of the crown, and published *annually,* whence they are known under the denomination of the *year books.* [72] From the reign of Henry the Eighth to the present time this task has been executed by many private and contemporary hands, who sometimes through haste and inaccuracy, sometimes through mistake and want of skill, have published very crude and imperfect (perhaps contradictory) accounts of one and the same determination.[5]

4. The doctrine *stare decisis,* that is stand upon or follow the decided cases, is firmly established in the law; indeed it may be said to be the foundation of our system of jurisprudence. A rule once firmly established by the decided cases should be followed until changed by statute. This rule has been violated in some instances, but such violations seem to us to be usurpations of the legislative function. *Dicta,* however, that is statements not necessary to the decision of the case, are not binding upon the courts in subsequent cases.

5. In this country reports are now usually prepared and published by official reporters. A report of a case usually contains: (1) The style of the case, i. e., the names of the parties plaintiff and defendant. (2) The headnotes or syllabus stating what the case decides and sometimes *dicta,* indicated by the words "semble" or "it seems." (3) The court from which the case is appealed and the manner of bringing it up for review, as by appeal or writ of error. (4) A statement of the facts of the case where they are not sufficiently stated in the opinion of the court. (5) Names of counsel and often a summary of their arguments with cases cited by them. (6) The opinion of the court, either unanimous, or, if not so, by the majority concurring and the judgment

Besides these reporters, there are also other authors, to whom great veneration and respect is paid by the students of the common law. Such are Glanvil and Bracton, Britton and Fleta, Hengham and Littleton, Statham, Brooke, Fitzherbert, Staundforde, and Coke, with some others of ancient date, whose treatises are cited as authority, and are evidence that cases have formerly happened, in which such and such points were determined, which are now become settled and first principles.[6]

II. **The second branch of the unwritten laws of England are particular customs, or laws, which affect only the inhabitants of particular districts.** [74][7]

These particular customs, or some of them, are without doubt the remains of that multitude of local customs out of which the common law, as it now stands, was collected at first by King Alfred, and afterwards by King Edgar and Edward the Confessor, each district mutually sacrificing some of its own special usages in order that the whole kingdom might enjoy the benefit of one uniform and universal system of laws. But for reasons that have been now long forgotten, particular counties, cities, towns, manors, and lordships were very early indulged with the privilege of abiding by their own customs, in contradistinction to the rest of the nation at large; which privilege is confirmed to them by several acts of parliament. Such are the customs of **gavelkind** in Kent, and some other parts of the kingdom; of **Borough-English,** that a widow shall be entitled for her dower to all her husband's lands, &c. [75]

To this head may most properly be referred a particular system of customs used only among one set of the King's subjects, or *lex mercatoria* [*the law merchant*]; which, however, different from the general rules of the common law, is yet ingrafted into it and made a part of it.[7a]

The rules relating to particular customs regard either the proof of their existence, their legality when proved, or their usual method of allowance.

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thereon. (7) If the decision is by a divided court, one or more dissenting opinions. The student will find Wallace on the Reporters a work of great value.

6. Blackstone's Commentaries are now also often cited as an authority on the common law; but modern treatises on the law, while often cited, are not authorities or binding upon the courts and are valuable only for the reasons and arguments they contain and for the cases they cite.

7. We have nothing of the sort in this country. See, however, usages and customs as incorporated into contracts, considered later under the head evidence, contracts.

7a. The law merchant is a part of the common law. See Cook v. Renick, 19 Ill. 602, per Caton, C. J.

First. **All private customs** (except gavelkind and borough-English, of which the law takes particular notice) **must be particularly pleaded, and as well the existence of such customs must be shown, as that the thing in dispute is within the custom alleged.** [76]

Second. When a custom is actually proved to exist, the next inquiry is into the **legality** of it. **To make a particular custom good, the following are necessary requisites:—**

1. That it have been used so long that the memory of man runneth not to the contrary.

2. It must have been continued. [77] Any interruption would cause a temporary ceasing; the revival gives it a new beginning, which will be within time of memory, and thereupon the custom will be void. But this must be understood with regard to an interruption of the *right*, for an interruption of the *possession* only for ten or twenty years will not destroy the custom. But if the *right* be any how discontinued for a day, the custom is quite at an end.

3. **It must have been peaceable and acquiesced in,** not subject to contention and dispute.

4. **Customs must be reasonable;** or, rather, taken negatively, they must not be unreasonable.

5. **Customs ought to be certain,** and the maxim of law is, *id certum est quod certum reddi potest.*[8] [78]

6. **Customs, though established by consent, must be (when established) compulsory,** and not left to the option of every man whether he will use them or no.

7. **Lastly, customs must be consistent with each other.** One custom cannot be set up in opposition to another. For if both are really customs, then both are of equal antiquity and both established by mutual consent, which to say of contradictory customs is absurd.

Third. **As to the allowance of special customs.**

Customs in derogation of the common law must be construed strictly.

III. The third branch of the leges non scriptæ are those peculiar laws which by custom are adopted and used only in certain peculiar courts and jurisdictions. And by these I understand the civil and canon laws. [79][9]

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8. That is certain which can be made certain.

9. Not a part of the American law except that the Roman civil law forms the basis of the jurisprudence of Louisiana. Many rules have, however, been adopted into the English common law from the Roman civil law, e. g., in the law of bailments. Also portions of these jurisdictions applicable to our condition have in this country been vested in various courts, e. g., admiralty jurisdiction in the federal courts, etc. See *post*, Courts.

It may seem a little improper at first view to rank these laws under the head of *leges non scriptae*, or unwritten laws. But I do this, after the example of Sir Matthew Hale, because it is most plain that it is not on account of their being *written* laws that either the canon law or the civil law have any obligation within this kingdom, neither do their force and efficacy depend upon their own intrinsic authority, which is the case of our written laws or acts of parliament. But all the strength that either the papal or imperial laws have obtained in this realm, or indeed in any other kingdom in Europe, is only because they have been admitted and received by immemorial usage and custom in some particular cases and some particular courts; and then they form a branch of the *leges non scriptae*, or customary laws, or else because they are in some other cases introduced by consent of parliament, and then they owe their validity to the *leges scriptae*, or statute law. [80]

The present body of civil law was compiled and finished by Tribonian and other lawyers about the year 533. [81]

This consists of: 1. **The institutes,** which contain the elements or first principles of the Roman law in four books; 2. **The digests or pandects** in fifty books, containing the opinions and writings of eminent lawyers digested in a systematical method; 3. **A new code,** or collection or imperial constitutions in twelve books, the lapse of a whole century having rendered the former code of Theodosius imperfect; 4. **The novels,** or new constitutions, posterior in time to the other books, and amounting to a supplement to the code, containing new decrees of successive emperors as new questions happened to arise. These form the body of Roman law, or *corpus juris civilis*, as published about the time of Justinian.

The canon law is a body of Roman ecclesiastical law relative to such matters as that church either has or pretends to have the proper jurisdiction over. [82] This is compiled from the opinions of the ancient Latin fathers, the decrees of general councils, and the decretal epistles and bulls of the holy see. Besides the pontifical collections, which during the times of popery were received as authentic in this island, as well as in other parts of Christendom, there is also a kind of natural canon law, composed of *legatine* and *provincial* constitutions, and adapted only to the exigencies of this church and kingdom. [83] At the dawn of the reformation in the reign of King Henry VIII, it was enacted in parliament that a review should be had of the canon law; and, till such review should be made, all canons, constitutions ordinances, and synodals provincial being then already made and not repugnant to the law of the land or the king's prerogative, should still be used and executed. And, as no such review has yet been perfected, upon this statute now depends the authority of the canon law in England.

There are four species of courts in which the civil and canon laws are permitted, under different restrictions, to be used: 1. The courts of the archbishops and bishops and their derivative officers, usually called

in our law courts Christian (*curiae Christianitatis*), or the **ecclesiastical courts.** 2. **The military courts.** 3. **The courts of admiralty.** 4. **The courts of the two universities.** In all, their reception in general and the different degrees of that reception are grounded entirely upon custom, corroborated in the latter instance by act of parliament ratifying those charters which confirm the customary law of the universities. [84]

1. **The courts of common law have the superintendency over these courts:** to keep them within their jurisdiction, to determine wherein they exceed them, to restrain and prohibit such excess, and, in case of contumacy, to punish the officer who executes, and in some cases the judge who enforces, the sentence so declared to be illegal.

2. **The common law has reserved to itself the exposition of all such acts of parliament as concern either the extent of these courts or the matters depending before them.** And, therefore, if these courts either refuse to allow these acts of parliament or will expound them in any other sense than what the common law puts upon them, the king's courts at Westminster will grant prohibitions to restrain and control them.

3. **An appeal lies from all these courts to the king in the last resort.**

The leges scriptæ — the written laws of the kingdom — are statutes, acts, or edicts made by the king's majesty, by and with the advice and consent of the lords spiritual and temporal and commons in parliament assembled. [85] The oldest of these now extant and printed in our statute books is the famous *Magna Charta,* as confirmed in parliament 9 Hen. III.

First, **Statutes are either general or special, public or private.**[1]

1. The method of citing these acts of parliament is various. Many of our ancient statutes are called after the name of the place where the parliament was held that made them; as the statutes of Merton and Marleberge, of Westminster, Gloucester and Winchester. Others are denominated entirely from their subject, as the statutes of Wales and Ireland, the *articuli cleri*, and the *praerogativa regis*. Some are distinguished by their initial words, a method of citing very ancient, being used by the Jews in denominating the books of the Pentateuch; by the Christian church in distinguishing their hymns and divine offices; by the Romanists in describing their papal bulles; and, in short, by the whole body of ancient civilians and canonists, among whom this method of citation generally prevailed, not only with regard to chapters, but inferior sections also; in imitation of all which we still call some of our old statutes by their initial words, as the statute of *quia emptores*, and that of *circumspecte agatis*. But the most usual method of citing them, especially since the

A general or public act is an universal rule that regards the whole community, and of this the courts of law are bound to take notice judicially and *ex officio* without the statute being particularly pleaded or formally set forth by the party who claims an advantage under it. [86] **Special or private acts** are rather exceptions than rules, being those which only operate upon particular persons and private concerns, and of these (which are not promulgated with the same notoriety as the former) the judges are not bound to take notice, unless they be formally shown and pleaded.[2]

Statutes also are either declaratory of the common law or remedial of some defects therein.

Declaratory, where the old custom of the kingdom is almost fallen into disuse or become disputable, in which case the parliament has thought proper, *in perpetuum rei testimonium*,[3] and for avoiding all doubts and difficulties, to declare what the common law is and ever hath been.[4]

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time of Edward the Second, is by naming the year of the king's reign in which the statute was made, together with the chapter, or particular act, according to its numeral order, as 9 Geo. II., c. 4, for all the acts of one session of parliament taken together make properly but one statute; and therefore, when two sessions have been held in one year, we usually mention stat. 1 or 2. Thus the bill of rights is cited as 1 W. and M. st. 2, c. 2, signifying that is the second chapter or act of the second statute, or the laws made in the second session of parliament, in the first year of king William and Queen Mary. See generally Wallace's Reporters; Dwarris on Statutes. Abbreviations used in Law Books by Chas. C. Soule (153 pages), will be found very useful to the student.

2. Books of statutes in the United States are of various sorts: Revisions or Compilations; Public Acts; Private Acts and Digests of Statutes.

Private acts are prohibited in some states by constitutional enactment. See generally as to Public and Private Statutes, Cooley's Const. Lim., § 97 *et seq.*; § 390 and cases cited.

3. For a perpetual testimony of the thing.

4. "It is always competent to change an existing law by a declaratory statute; and where the statute is only to operate upon future cases it is no objection to its validity that it assumes the law to have been in past what it is now declared that it shall be in the future. But the legislative action cannot be made to retroact upon past controversies and to reverse decisions which the courts in the exercise of their undoubted authority have made." Cooley's Const. Lim. (4th Ed.), § 94, and cases cited. This book is one of great value and cannot be to carefully studied.

Remedial statutes are those which are made to supply such defects and abridge such superfluities in the common law as arise either from the general imperfection of all human laws, from change of time and circumstances, from the mistakes and unadvised determinations of unlearned (or even learned) judges, or from any other cause whatsoever. And this being done, either by enlarging the common law where it was too narrow and circumscribed, or by restraining it where it was too lax and luxuriant, hath occasioned another subordinate division of remedial acts of parliament into *enlarging* and *restraining* statutes.[4a] [87]

Secondly, **Rules with regard to the construction of statutes.**[5]

1. **There are three points to be considered in the construction of all remedial statutes, the old law, the mischief, and the remedy;** that is, how the common law stood at the making of the act, what the mischief was for which the common law did not provide, and what remedy the parliament hath provided to cure this mischief. And it is the business of the judges so to construe the acts as to suppress the mischief and advance the remedy.

2. **A statute which treats of things or persons of an inferior rank cannot by any general words be extended to those of a superior.** [88]

3. **Penal statutes must be construed strictly.**[6]

4. **Statutes against frauds are to be liberally and beneficially expounded.** This may seem a contradiction to the last rule, most statutes against frauds being in their consequences penal. But this difference is here to be taken: where the statute acts upon the offender and inflicts a penalty, as the pillory or a fine, it is then to be taken strictly; but when the statute acts upon the offence, by

4a. A statute giving a party a remedy for a wrong where he had none or a different one before, is also called a remedial statute.

5. See "Interpretation" and note, *ante*. See, also, generally, Black on Construction and Interpretation of Laws (2d Ed.), 1911.

6. A penal statute is one that inflicts a penalty or imposes a forfeiture, and is not to be extended beyond its words.

setting aside the fraudulent transaction, here it is to be construed liberally.

5. **One part of a statute must be so construed by another that the whole may (if possible) stand:** *ut res magis valeat, quam pereat.*[7] [89]

6. **A saving totally repugnant to the body of the act is void.**[8]

7. **Where the common law and a statute differ, the common law gives place to the statute, and an old statute gives place to a new one.** But this is to be understood only when the latter statute is couched in negative terms, or where its matter is so clearly repugnant that it necessarily implies a negative. But if both acts be merely affirmative, and the substance such that both may stand together, here the latter does not repeal the former, but they shall both have a concurrent efficacy. [90]

8. **If a statute that repeals another is itself repealed afterwards, the first statute is hereby revived without any formal words for that purpose.**[9]

9. **Acts of parliament derogatory from the power of subsequent parliaments bind not.** [See Const. U. S., Art. I., sec. 10, relative to laws impairing the obligation of contracts.][1]

10. **Lastly, acts of parliament that are impossible to be performed are of no validity;** and if there arise out of them collaterally any absurd consequences manifestly contradictory to common reason, they are, with regard to those collateral consequences, void. [91] But if the parliament will positively enact a thing to be done which is unreasonable, I know of no power in the ordinary forms of the constitution that is vested with authority to control it.[2]

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7. This is a general rule of construction and also applies to contracts and wills, etc.

8. See 1 Kent Com., pp. 462, 463.

9. This rule has been changed by statute in some of the states and also in the United States jurisdiction. Repeals by implication are not favored.

1. See Cooley's Const. Lim. (4th Ed.), *126 and cases cited.

2. The courts, however, will, if pos-

SECTION IV.

OF THE COUNTRIES SUBJECT TO THE LAWS OF ENGLAND.

The kingdom of England, over which our municipal laws have jurisdiction, includes not, by the common law, either Wales, Scotland, or Ireland, or any other part of the king's dominions, except the territory of England only.[3] [93]

The kingdom of England in particular comprehends not only Wales and Berwick [by statute], but also part of the sea. The main or high seas are part of the realm of England, for thereon our courts of admiralty[4] have jurisdiction; but they are not subject to the common law. [110] This main sea begins at the low-water mark. But between the high-water mark and the low-water mark, where the sea ebbs and flows, the common law and the admiralty have *divisum imperium,* an alternate jurisdiction, — one upon the water when it is full sea, the other upon the land when it is an ebb.

The territory of England is liable to two divisions,—the one ecclesiastical, the other civil. [111]

1. **The ecclesiastical division is, primarily, into two provinces, those of Canterbury and York.** A province is the circuit of an archbishop's jurisdiction. Each province contains divers **dioceses,** or sees of suffragan bishops, whereof Canterbury includes twenty-one [23] and York three [7], besides the bishopric of the Isle of Man. Every diocese is divided

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sible, give a statute a reasonable interpretation.

In the United States, however, a statute may be declared void as being in conflict with either the constitution of the United States or of a state.

3. See 1 Broom & Hadley's Commentaries on the Laws of England, Introduction, sec. 4.

4. The constitution of the United States grants to the federal government judicial power over * * * "all cases of admiralty and maritime jurisdiction." As to the extent of this grant, see Benedict's Admiralty (4th Ed.), pp. 5, 7, 11, and notes in which the cases are fully cited, also Hughes on Admiralty, p. 7 *et seq.*

into **archdeaconries**, whereof there are sixty in all, each archdeaconry into **rural deaneries**, which are the circuit of the archdeacon's and rural dean's jurisdiction, of whom hereafter, and every deanery is divided into **parishes**.

A **parish** is that circuit of ground which is committed to the charge of one parson or vicar, or other minister having cure of souls therein.

2. **The civil division of the territory of England is into counties, of those counties into hundreds, of those hundreds into tithings or towns.** [113]

BOOK THE FIRST.

OF THE RIGHTS OF PERSONS.

CHAPTER I.

OF THE ABSOLUTE RIGHTS OF INDIVIDUALS.

The primary and principal object of the law are rights and wrongs. [122]

Rights are, however, liable to another subdivision, being either, first, those which concern and are annexed to the persons of men, and are then called *jura personarum,* or the *rights of persons;* or they are, secondly, such as a man may acquire over external objects or things unconnected with his person, which are styled *jura rerum,* or the *rights of things.*[1] **Wrongs** also are divisible into, first, *private wrongs,* which, being an infringement merely of particular rights, concern individuals only, and are called civil injuries; and, secondly, *public wrongs,* which, being a breach of general and public rights, affect the whole community, and are called crimes and misdemeanors.

The present commentaries will consist of the four following parts: 1. *The rights of persons,* with the means whereby such rights may be either acquired or lost; 2. *The rights of things,* with the means also of acquiring and losing them; 3. *Private wrongs,* or civil injuries, with the means of redressing them by law; 4. *Public wrongs* or cirmes and misdemeanors, with the means of prevention and punishment.

First. **The rights of persons,** with the means of acquiring and losing them.

1. See Introduction to Hammond's Justinian, p. *l et seq.*, for a learned discussion of this subject.

The rights of persons that are commanded to be observed by the municipal law are of two sorts: First, such as are due *from* every citizen, which are usually called **civil duties**; and, secondly, such as belong *to* him, which is the more popular acceptation of **rights** or *jura*. [123] Both may indeed be comprised in this latter division; for, as all social duties are of a relative nature, at the same time that they are due *from* one man or set of men, they must also be due *to* another. But it will be more clear and easy to consider many of them as duties required from, rather than as rights belonging to, particular persons.

Persons also are divided by the law into either natural persons or artificial. Natural persons are such as the God of nature formed us; artificial are such as are created and devised by human laws for the purposes of society and government, which are called corporations or bodies politic.[2]

The rights of persons considered in their natural capacities are also of two sorts, — absolute and relative. Absolute, which are such as appertain and belong to particular men merely as individuals or single persons; relative, which are incident to them as members of society and standing in various relations to each other.

By the absolute rights of individuals we mean those which are so in their primary and strictest sense, such as would belong to their persons merely in a state of nature, and which every man is entitled to enjoy, whether out of society or in it. But with regard to the absolute *duties* which man is bound to perform, considered as a mere individual, it is not to be expected that any human municipal law should at all explain or enforce them. [124] For the end and intent of such laws being only to regulate the behavior of mankind, as they are members of society and stand in various relations to each other, they have consequently no concern with any other but social or relative duties. But with respect to *rights* the case is different. Human laws define and enforce as well those rights which

2. Considered *post*.

belong to a man considered as an individual as those which belong to him considered as related to others. The principal view of human laws is, or ought always to be, to explain, protect, and enforce such rights as are absolute, which in themselves are few and simple, and then such rights as are relative, which, arising from a variety of connections, will be far more numerous and more complicated. [125]

The absolute rights of man, considered as a free agent, are usually summed up in one general appellation, and denominated the natural liberty of mankind. This **natural liberty** consists properly in a power of acting as one thinks fit, without any restraint or control unless by the law of nature, — being a right inherent in us by birth, and one of the gifts of God to man at his creation, when he endued him with the faculty of free will. But every man, when he enters into society gives up a part of his natural liberty as the price of so valuable a purchase, and, in consideration of receiving the advantages of mutual commerce, obliges himself to conform to those laws which the community has thought proper to establish. **Political, therefore, or civil liberty,** which is that of a member of society, is no other than natural liberty so far restrained by human laws (and no farther) as is necessary and expedient for the general advantage of the public.[3]

The fundamental articles of the absolute rights of every Englishman (which, taken in a political and extensive sense, are usually called their liberties) have been from time to time asserted in parliament as often as they were

3. Referring to Civil Liberty, Judge Cooley in his work on Torts, p. *8, states that writers of acknowledged authority employ the term in very different sense. "We prefer [says he] to distinguish civil from political liberty, defining the former as that condition in which rights are established and protected by means of such limitations and restraints upon the action of individual members of the political society as are needed to prevent what would be injurious to other individuals or prejudicial to the general welfare and defining political liberty as consisting in an effectual participation of the people in the making of the laws. The former may exist when the latter in absent." Cooley on Torts, §§ 9-10.

thought to be in danger. [127] First, by **the great charter of liberties**, which was obtained, sword in hand, from King John, and afterwards, with some alterations, confirmed in parliament by King Henry the Third, his son, — which charter contained very few new grants, but was for the most part declaratory of the principal grounds of the fundamental laws of England.[4] [128] Afterwards by the statute called **confirmatio cartarum**,[5] whereby the Great Charter is directed to be allowed as the common law. Next, by a multitude of subsequent corroborating statutes (Sir Edward Coke, I think, reckons thirty-two), from the First Edward to Henry the Fourth. Then, after a long interval, by **the petition of right**, which was a parliamentary declaration of the liberties of the people assented to by King Charles the First in the begining of his reign. Then the **habeas corpus act**, passed under Charles the Second. To these succeeded **the bill of rights**, or declaration delivered by the Lords and Commons to the Prince and Princess of Orange, 13th of February, 1688, and afterwards enacted in parliament, when they became king and queen. Lastly, these liberties were again asserted at the commencement of the present century in the **act of settlement**, whereby the crown was limited to his present Majesty's illustrious house.

The absolute rights of individuals may be reduced to three principal or primary articles, — the right of **personal security**, the right of **personal liberty**, and the right of **private property** [129] [to which may be added the right of **free exercise and enjoyment of religious profession and worship**, and also, in a state of society, of **freedom of speech and of the press.**][6]

4. An examination of the various state and the United States constitutions will show that many provisions of Magna Charta have been incorporated in the various bills of rights. E. g., see Const. 1870 of Ill., art. II., Bill of Rights; U. S. Const., art. V.

5. Confirmation of the charters.

6. See Const. U. S. Amendments, art. I.; 2 Kent Com., 34; Cooley's Const. Lim. (4th Ed.), chaps. 12 and 13. In these chapters (12 and 13) will be found an able discussion of these subjects with a full citation of authorities.

I. **The right of personal security** consists in a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation.

1. **Life** is a right inherent by nature in every individual, and begins in contemplation of law as soon as an infant is able to stir in the mother's womb. For if a woman is quick with child, and by a potion or otherwise killeth it in her womb, or if any one beat her, whereby the child dieth in her body and she is delivered of a dead child, this, though not murder, was by the ancient law homicide or manslaughter. But the modern law doth not look upon this offence in quite so atrocious a light, but merely as a heinous misdemeanor.[7] [130]

An infant in ventre sa mere, or in the mother's womb, is supposed in law to be born for many purposes. It is capable of having a legacy or a surrender of a copyhold estate made to it. It may have a guardian assigned to it, and it is enabled to have an estate limited to its use, and to take afterwards by such limitation as if it were then actually born.

2. **A man's limbs** (by which for the present we only understand those members which may be useful to him in fight,[8] and the loss of which alone amounts to **mayhem** by the common law) are also the gift of the wise Creator to enable him to protect himself from external injuries in a state of nature. To these therefore he has a natural inherent right, and they cannot be wantonly destroyed or disabled without a manifest breach of civil liberty.

Both the life and limbs of a man are of such high value in the estimation of the law of England, that it pardons even homicide if committed *se defendendo*,[9] or in order to preserve them. If a man through fear of death or mayhem is prevailed upon to execute a deed or do any other legal act, these though accompanied with all the other requisite solemnities, may be afterwards avoided, if forced upon him

7. See *post*, Criminal Law.

8. It is not mayhem at common law to slit a man's nose, notwithstanding it is useful to "smell the battle afar off." See *post*, Criminal Law.

9. In self-defense.

by a well-grounded apprehension of losing his life, or even his limbs, in case of his non-compliance. And the same is also a sufficient excuse for the commission of many misdemeanors. The constraint a man is under in these circumstances is called in law **duress**, of which there are two sorts: **duress of imprisonment,**[1] where a man actually loses his liberty, of which we shall presently speak, and **duress per minas,** where the hardship is only threatened and impending, which is that we are now discoursing of. [131] Duress *per minas* is either for fear of loss of life, or else for fear of mayhem or loss of limb. And this fear must be upon sufficient reason. A fear of battery or being beaten, though never so well grounded, is no duress, neither is the fear of having one's house burned or one's goods taken away and destroyed; because in these cases, should the threat be performed, a man may have satisfaction by recovering equivalent damages, but no suitable atonement can be made for the loss of life or limb. [See, however, Ewell's Lead. Cases, 771-773, and cases cited; 14 Am. Law Reg. N. S. 201.]

These rights of life and member can only be determined by the death of the person, which was formerly accounted to be either a civil[2] or natural death. [132]

The civil death commenced, if any man was banished or abjured the realm, by the process of the common law, or entered into religion; that is, went into a monastery and became there a monk professed: in which cases he was absolutely dead in law, and his next heir should have his

1. See the subject of Duress in its various phases fully considered and the leading cases given in full with voluminous notes in Ewell's Lead. Cases (1st Ed.), 760-794. The following leading cases will be found there reported and annotated. Stepney v. Lloyd, Cro. Eliz. 647, duress of imprisonment; Watkins v. Baird, 6 Mass., 506, abuse of legal process; Whitefield v. Longfellow, 13 Me. 146, duress *per minas* (by threats); Astley v. Reynolds, 2 Strange, 915; s. c., 2 Barnard-K. B. 40, duress of goods; Skeate v. Beale, 11 Ad. & Ell. 983, duress of goods; Sasportas v. Jennings, 1 Bay, s. c. 470, duress of goods. As to who may avail himself of duress, see Huscombe v. Standing, Cro. Jac., 187; Thompson v. Lockwood, 15 John. 256.

2. By statute in many states various disabilities, besides imprisonment, are imposed upon persons convicted of felony. Consult the local statutes and constitutions. See, also, U. S. Const., art. 3, sec. 3, clause 2; Avery v. Everett, 110 N. Y. 317.

estate. Since the Reformation this disability is held to be abolished, as is also the disability of banishment consequent upon abjuration, by statute 21 Jac. I. c. 28. [133]

This natural life cannot legally be disposed of or destroyed by any individual, neither by the person himself, nor by any other of his fellow-creatures, merely upon their own authority. Yet nevertheless it may be frequently forfeited for the breach of those laws of society which are enforced by the sanction of capital punishments.

"*Nullus liber homo*," says the Great Charter, "*aliquo modo destruatur, nisi per legale judicium parium suorum aut per legem terrae.*"[3] Which words, "*aliquo modo destruatur*," include a prohibition, not only of *killing* and *maiming*, but also of *torturing*, and of every oppression by color of an illegal authority.

3. Besides those limbs and members that may be necessary to a man in order to defend himself or annoy his enemy, **the rest of his person or body is also entitled by the same natural right to security** from the corporal insults of menaces, assaults, beating, and wounding, though such insults amount not to destruction of life or member. [134]

4. **The preservation of a man's health** from such practices as may prejudice or annoy it; and

5. **The security of his reputation or good name from the arts of detraction and slander** are rights to which every man is entitled by reason and natural justice, since without these it is impossible to have the perfect enjoyment of any other advantage or right.[4]

II. **Personal liberty consists in the power of locomotion, of changing situation, or moving one's person to whatsoever place one's own inclination may direct, without imprisonment or restraint unless by due course of law.** This is a right strictly natural. The laws of England have never abridged it without sufficient cause, and in this kingdom

3. No freeman shall in any manner be destroyed unless by the legal judgment of his peers or by the law of the land.

4. The means by which these rights are protected will be considered later on.

it cannot ever be abridged at the mere discretion of the magistrate without the explicit permission of the laws. Here again the language of the Great Charter is, that no freeman shall be taken or imprisoned but by the lawful judgment of his equals or by the law of the land.[5] [135]

By 31 Car. II. c. 2, commonly called the **habeas corpus act,**[6] the methods of obtaining the writ [of *habeas corpus*] are so plainly pointed out and enforced, that, so long as this statute remains unimpeached, no subject of England can be long detained in prison, except in those cases in which the law requires and justifies such detainer. And, lest this act should be evaded by demanding unreasonable bail or sureties for the prisoner's appearance, it is declared by 1 W. and M. st. 2, c. 2, that excessive bail ought not to be required.

The confinement of the person in any wise is an imprisonment, so that the keeping a man against his will in a private house, putting him in the stocks, arresting or forcibly detaining him in the street, is an imprisonment. [136] And the law so much discourages unlawful confinement, that if a man is under *duress of imprisonment,* which we before explained to mean a compulsion by an illegal restraint of liberty, until he seals a bond or the like, he may allege this duress, and avoid the extorted bond. But if a man be lawfully imprisoned, and, either to procure his discharge or on any other fair account, seals a bond or a deed, this is not by duress of imprisonment, and he is not at liberty to avoid it. [137] **To make imprisonment lawful,** it must either be by process from the courts of judicature or by warrant from some legal officer having authority to commit to prison, which warrant must be in writing, under the hand and *seal* of the magistrate, and express the causes of the commitment, in order to be examined into if necessary upon

5. See Cooley's Const. Lim. (4th ed.), ch. XI. (82 pages), for a learned and exhaustive consideration of the protection afforded by the law of the land with a full citation of authorities. See also, Blackwell on Tax Titles, pp. *6, 11.

6. See the various state constitutions and art. 1, sec. 9, clause 2, U. S. Const.

a *habeas corpus*. If there be no cause expressed, the jailer is not bound to detain the prisoner.[7]

A natural and regular consequence of this personal liberty is that **every Englishman may claim a right to abide in his own country so long as he pleases,** and not to be driven from it unless by the sentence of the law. The king, indeed, by his royal prerogative, may issue out his writ **ne exeat regno,**[8] and prohibit any of his subjects from going into foreign parts without license. But no power on earth, except the authority of parliament, can send any subject of England *out* of the land against his will — no, not even a criminal. For exile and transportation are punishments at present unknown to the common law, and wherever the latter is now inflicted it is either by the choice of the criminal himself to escape a capital punishment, or else by the express direction of some modern act of parliament. To this purpose the Great Charter declares that no freeman shall be banished unless by the judgment of his peers or by the law of the land. Though *within* the realm the king may command the attendance and service of all his liegemen, yet he cannot send any man *out of* the realm, even upon the public service, excepting sailors and soldiers, the nature of whose employment necessarily implies an exception; he cannot even constitute a man lord deputy or lieutenant of Ireland against his will, nor make him a foreign ambassador. [138] For this might in reality be no more than an honorable exile.

III. **The third absolute right, inherent in every Englishman, is that of property,** which consists in the free use, enjoyment, and disposal of all his acquisitions, without any

7. There are various cases in which an arrest may be justified without legal process, as, for example, of a child by his parents in certain cases, arrests without warrant of a person committing a felony, etc. These cases will be considered in their proper places. See Cooley on Torts, § 174.

8. Let him not depart from the kingdom. This writ, though not common, may in certain cases be issued in aid of equitable remedies in order to protect the defendant from defeating the relief sought by leaving the state or removing therefrom his property. It is a sort of process to compel the giving of bail in equitable cases. See 2 Bouvier Law Dict., *ne exeat republica;* 2 Kent Com., 32, and authorities cited.

control or diminution save only by the laws of the land. Upon this principle the Great Charter has declared that no freeman shall be disseised or divested of his freehold, or of his liberties or free customs, but by the judgment of his peers or by the law of the land.[9] [139]

So great, moreover, is the regard of the law for private property, that it will not authorize the least violation of it, not even for the general good of the whole community. If a **new road,** for instance, were to be made through the grounds of a private person, it might perhaps be extensively beneficial to the public; but the law permits no man, or set of men, to do this without consent of the owner of the land. In this and similar cases the legislature alone can, indeed frequently does, interpose and compel the individual to acquiesce, not by absolutely stripping the subject of his property in an arbitrary manner, but by giving him a full indemnification and equivalent for the injury thereby sustained.[1]

No subject of England can be constrained to pay any **aids or taxes,** even for the defence of the realm or the support of government, but such as are imposed by his own consent or that of his representatives in parliament.[2] [140]

The constitution has established certain other auxiliary subordinate rights of the subject, which serve principally as outworks or barriers to protect and maintain inviolate the three great and primary rights of personal security, personal liberty, and private property. [141] These are,—

1. **The constitution, powers, and privileges of parliament.**

2. **The limitation of the king's prerogative** by bounds so certain and notorious that it is impossible he should either mistake or legally exceed them without the consent of the people.

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9. See notes, *ante.*

1. See generally Cooley's Const. Lim., ch. 15; Lewis on Eminent Domain; Mills, Em. Dom.; Nichols, Em. Dom.; Randolph, Em. Dom.; 1 Bouvier Law Dict. Em. Dom. In cases of controlling public necessity, also, private property may be taken or even destroyed, as in case of the destruction of houses to prevent the spreading of a fire, pestilence, etc. See Cooley on Torts, § 594 and cases cited.

2. See generally Cooley on Taxation; Blackwell on Tax Titles.

3. **The right of applying to the courts of justice for redress of injuries.** The emphatical words of *Magna Charta*, spoken in the person of the king, who, in judgment of law (says Sir Edward Coke), is ever present and repeating them in all his courts, are these: *nulli vendemus, nulli negabimus, aut differemus rectum vel justitiam.*[3] "And therefore every subject," continues the same learned author, "for injury done to him *in bonis, in terris, vel persona*,[4] by any other subject, be he ecclesiastical or temporal, without any exception, may take his remedy by the course of the law, and have justice and right for the injury done to him freely without sale, fully without any denial, and speedily without delay."

Not only the substantial part or judicial decisions of the law, but also the formal part or method of proceeding cannot be altered but by parliament. [142] The king, it is true, may erect new courts of justice, but then they must proceed according to the old established forms of the common law.

4. **If there should happen any uncommon injury,** or infringement of the rights before mentioned, which the ordinary course of law is too defective to reach, there still remains a fourth subordinate right appertaining to every individual, namely, **the right of petitioning the king or either house of parliament for the redress of grievances.**[5] [143] Care only must be taken lest, under the pretence of petitioning, the subject be guilty of any riot or tumult, as happened in the opening of the memorable parliament in 1640.

5. The fifth auxiliary right of the subject is that of **having arms for their defence suitable to their condition and degree, and such as are allowed by law.**[6] [144]

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3. To none will we sell, to none will we deny or delay right or justice.

4. In goods, lands, or person.

5. See U. S. Const. Amendments, art. 1, also the several state constitutions.

6. See U. S. Const. Amendments, art. 2, and state constitutions; Cooley Const. Lim., *350. The statutory prohibition of carrying concealed weapons is generally held to be constitutional, though there are cases to the contrary. See Cooley Const. Lim. (4th ed.), *350 note and cases cited; 2 Bish. Crim. Law (3d ed.), § 125.

CHAPTER II.

OF THE PARLIAMENT.

The most universal public relation by which men are connected together, is that of government: namely, as governors or governed; or, in other words, as magistrates and people. [146] Of magistrates, some also are *supreme,* in whom the sovereign power of the state resides; others are *subordinate,* deriving all their authority from the supreme magistrate, accountable to him for their conduct, and acting in an inferior, secondary sphere.

In all tyrannical governments the supreme magistracy, or the right of both making and of enforcing the laws, is vested in one and the same man or one and the same body of men; and wherever these two powers are united together, there can be no public liberty. But where the legislative and executive authority are in distinct hands, the former will take care not to intrust the latter with so large a power as may tend to the subversion of its own independence, and therewith of the liberty of the subject. With us, therefore, **in England, this supreme power is divided into two branches: the one legislative, to wit the parliament, consisting of king, Lords, and Commons; the other executive, consisting of the king alone.**[1] [147]

I. **As to the manner and time of assembling of parliament.** The parliament is regularly to be summoned by the king's writ or letter, issued out of chancery by advice of the privy council, at least forty [now thirty-five] days before it begins to sit. [150] It is a branch of the royal prerogative that no parliament can be convened by its own authority, or by the authority of any, except the king alone. Nor is it an exception to this rule that, by some modern statutes, on the demise of a king or queen, if there be then no parliament in being, the last parliament revives, and it

1. In the United States and the several states there are three co-ordinate departments, the legislative, executive and judicial, each supreme within its appropriate sphere and within the limits of the constitution.

is to sit again for six months, unless dissolved by the successor, for this revived parliament must have been originally summoned by the crown.

By the statute 16 Car. II. c. 1, it is enacted that the sitting and holding of parliaments shall not be intermitted above three years at the most. [153] And by the statute 1 W. and M. st. 2, c. 2, it is declared to be one of the rights of the people, that for redress of all grievances, and for the amending, strengthening, and preserving the laws, parliaments ought to be held *frequently*. And this indefinite *frequency* is again reduced to a certainty by statute 6 W. and M. c. 2, which enacts, as the statute of Charles the Second had done before, that a new parliament shall be called within three years after the determination of the former. [Owing to the fact that the mutiny act and supplies are voted for only one year, annual sessions are now necessary.]

II. **The constituent parts of a parliament are the king's majesty, sitting there in his royal political capacity and the three estates of the realm,** the Lords Spiritual, the Lords Temporal (who sit, together with the king, in one house), and the Commons, who sit by themselves in another. And the king and these three estates together form the great corporation of body politic of the kingdom, of which the king is said to be *caput, principium, et finis*.[2] For upon their coming together the king meets them, either in person or by representation, without which there can be no begining of a parliament; and he also has alone the power of dissolving them.

It is highly necessary for preserving the balance of the constitution that the executive power should be a branch, though not the whole, of the legislative. [154] The total union of them would be productive of tyranny; the total disjunction of them, for the present, would in the end produce the same effects, by causing that union against which it seems to provide. The legislative would soon become tyrannical, by making continual encroachments, and gradu-

2. The head, the beginning and the end.

ally assuming to itself the rights of the executive power. To hinder, therefore, any such encroachments the king is himself a part of the parliament; and as this is the reason of his being so, very properly, therefore, the share of legislation, which the constitution has placed in the crown, consists in the power of *rejecting* rather than *resolving*,— this being sufficient to answer the end proposed.[3] And herein indeed consists the true excellence of the English government, that all the parts of it form a mutual check upon each other. [155] In the legislature, the people are a check upon the nobility, and the nobility a check upon the people, by the mutual privilege of rejecting what the other has resolved: while the king is a check upon both, which preserves the executive power from encroachments. And this very executive power is again checked and kept within due bounds by the two Houses, through the privilege they have of inquiring into, **impeaching**,[4] and punishing the conduct (not indeed of the king, which would destroy his constitutional independence, but, which is more beneficial to the public) of his evil and pernicious counsellors.

[**The king's majesty** is the subject of subsequent chapters.]

The Spiritual Lords consist of two archbishops and twenty-four bishops, and at the dissolution of monastries by Henry VIII. consisted likewise of twenty-six mitred abbots and two priors, — a very considerable body, and in those times equal in number to the temporal nobility. But though these Lords Spiritual are in the eye of the law a distinct estate from the Lords Temporal, and are so distinguished in most of our acts of parliament, yet in practice they are usually blended together under the one name of *the Lords*. They intermix in their votes, and the majority of such intermixture joins both estates. [156] And from this want of a separate assembly and separate negative of the prelates, some writers have argued very cogently that

3. The veto power is practically obsolete in England though not in the United States. See U. S. Const., art. 1, sec. 7, cl. 2.

4. See U. S. Const., art. 2, sec. 4.

the Lords Temporal and Spiritual are now in reality only one estate, which is unquestionably true in every effectual sense, though the ancient distinction between them still nominally continues.

The Lords Temporal consist of all the peers of the realm (the bishops not being in strictness held to be such, but merely lords of parliament), by whatever title of nobility distinguished, dukes, marquises, earls, viscounts, or barons. [157] Some of these sit by descent, as do all ancient peers; some by creation, as do all new-made ones; others, since the union with Scotland, by election, which is the case of the sixteen peers who represent the body of the Scots nobility. Their number is indefinite, and may be increased at will by the power of the crown.

The Commons consist of all such men of property in the kingdom as have not seats in the House of Lords, every one of which has a voice in parliament, either personally or by his representatives. [158] The counties are represented by knights, elected by the proprietors of lands; the citizens and boroughs are represented by citizens and burgesses, chosen by the mercantile part, or supposed trading interest of the nation. [159]

The number of English representatives is 513, and of Scots 45; in all 558 [652]). And every member, though chosen by one particular district, when elected and returned, serves for the whole realm. For the end of his coming thither is not particular, but general; not barely to advantage his constituents, but the *common* wealth. And therefore he is not bound, like a deputy in the United Provinces, to consult with or take the advice of his constituents upon any particular point, unless he himself thinks it proper or prudent so to do.

III. We are next to examine the **laws and customs relating to parliament** thus united together, and considered as one aggregate body. [160]

The power and jurisdiction of parliament is so transcendent and absolute, that it cannot be confined, either for causes or persons, within any bounds. It hath sovereign and uncontrollable authority in the making, confirming, enlarging, restraining, abrogating, repealing, reviving, and

expounding of laws, concerning matters of all possible denominations, ecclesiastical or temporal, civil, military, maritime, or criminal: this being the place where that absolute despotic power, which must in all governments reside somewhere, is intrusted by the constitution of these kingdoms. All mischiefs and grievances, operations and remedies, that transcend the ordinary course of the laws are within the reach of this extraordinary tribunal. [161] It can regulate or new model the succession to the crown; it can alter the established religion of the land; it can change and create afresh even the constitution of the kingdom and of parliaments themselves, — it can, in short, do everything that is not naturally impossible; and therefore some have not scrupled to call its power, by a figure rather too bold, the omnipotence of parliament.[5]

The whole of the law and custom of parliament has its original from this one **maxim,** "that whatever matter arises concerning either House of parliament ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere."[6] [163] Hence, for instance, the Lords will not suffer the Commons to interfere in settling the election of a peer of Scotland; the Commons will not allow the Lords to judge of the election of a burgess; nor will either House permit the subordinate courts of law to examine the merits of either case.[7]

The privileges of parliament are likewise very large and indefinite. [164] "And the determination and knowledge of that privilege belongs to the Lords of parliament, and not to the justices." Privilege of parliament was principally established in order to protect its members, not only from being molested by their fellow-subjects, but also more especially from being oppressed by the power of the crown. The dignity and independence of the two Houses are in great measure preserved by keeping their privileges in-

5. In this country both the state and federal legislatures are limited in their powers by written constitutions and any statute contrary to the constitution is null and void.

6. See U. S. Const., art. 1, sec. 5, cl. 1.

7. See U. S. Const., art. 1, sec. 6, cl. 1.

definite. [These privileges are circumscribed by law and determined by precedent.] **Some, however, of the more notorious privileges** of the members of either House are privilege of speech, of person, of their domestics, and of their lands and goods.

As to the first privilege, of speech,[8] it is declared by the statute 1 W. and M. st. 2, c. 2, as one of the liberties of the people, "that the freedom of speech and debates and proceedings in parliament ought not to be impeached or questioned in any court or place out of parliament." And this freedom of speech is particularly demanded of the king in person by the Speaker of the House of Commons at the opening of every new parliament. **So likewise are the other privileges of persons,**[9] **servants, lands, and goods,** which are immunities as ancient as Edward the Confessor. [165] This included formerly not only privilege from illegal violence, but also from legal arrests, and seizures by process from the courts of law. And still, to assault by violence a member of either House, or his menial servants, is a high contempt of parliament, and there punished with the utmost severity. Neither can any member of either House be arrested and taken into custody, unless for some indictable offence, without a breach of the privilege of parliament.

But all other privileges which derogate from the common law in matters of civil right are now at an end, save only as to the freedom of the member's person, which in a peer (by the privilege of peerage) is forever sacred and inviolable, and in a commoner (by the privilege of parliament) for forty days after every prorogation and forty days before the next appointed meeting, which is now in effect as long as the parliament subsists, it seldom being prorogued for more than fourscore days at a time. All other privileges which obstruct the ordinary course of justice are now

8. See U. S. Const., art. 1, sec. 6, cl. 1.

9. In this country privilege of person extends to attendance at session of legislature and going and returning therefrom; but there is no privilege of servants, lands or goods. See generally Cooley's Const. Lim. (4th ed.), *134 *et seq.*

totally abolished by statute 10 Geo. III. c. 50, which enacts that any suit may at any time be brought against any peer or member of parliament, their servants, or any other person entitled to privilege of parliament, which shall not be impeached or delayed by pretence of any such privilege, except that the person of a member of the House of Commons shall not thereby be subjected to any arrest of imprisonment.

The only way by which courts of justice could anciently take cognizance of privilege of parliament was by writ of privilege, in the nature of a supersedeas, to deliver the party out of custody when arrested in a civil suit. But since the statute 12 W. III. c. 3, which enacts that no privileged person shall be subject to arrest or imprisonment, it hath been held that **such arrest is irregular ab initio,** and that the party may be discharged upon motion [or on *habeas corpus*].

The claim of privilege hath been usually guarded with an exception as to the case of indictable crimes, or, as it has been frequently expressed, of treason, felony, and breach (or surety) of the peace. Whereby it seems to have been understood that no privilege was allowable to the members, their families or servants, in any *crime* whatsoever, for all crimes are treated by the law as being *contra pacem domini regis.*[1] To which may be added that a few years ago the case of writing and publishing seditious libels was resolved by both Houses not to be entitled to privilege, and that the reasons upon which that case proceeded extended equally to every indictable offence. [167] So that the chief, if not the only, privilege of parliament in such cases seems to be the right of receiving immediate information of the imprisonment or detention of any member, with the reason for which he is detained.

IV. The laws and customs relating to the House of Lords in particular. Their judicial capacity will be more properly treated of in the third and fourth books of these Commentaries.

They have a right to be attended, and constantly are, by the judges

1. Against the king's peace.

of the Court of King's Bench and Common Pleas, and such of the Barons of the Exchequer as are of the degree of the coif, or have been made serjeants at law; as likewise by the king's learned counsel, being serjeants, and by the masters of the court of chancery, for their advice in point of law, and for the greater dignity of their proceedings. [168]

Another privilege is, that every peer, by license obtained from the king, may make another lord of parliament his proxy, to vote for him in his absence—a privilege which a member of the other House can by no means have, as he is himself but a proxy for a multitude of other people.

Each peer has also a right, by leave of the House, when a vote passes contrary to his sentiments, to enter his dissent on the journals of the House, with the reasons for such dissent, which is usually styled his protest.

All bills, likewise, that may in their consequences any way affect the right of the peerage are by the custom of parliament to have their first rise and beginning in the House of Peers, and to suffer no changes or amendments in the House of Commons.

V. **The peculiar laws and customs of the House of Commons** relate principally to the raising of taxes and the election of members to serve in parliament. [169]

First, with regard to taxes, it is the ancient indisputable privilege and right of the House of Commons that all grants of subsidies or parliamentary aids do begin in their House[2] and are first bestowed by them, although their grants are not effectual to all intents and purposes until they have the assent of the other two branches of the legislature. [See U. S. Const., Art. 1, § 7.] So reasonably jealous are the commons of this valuable privilege, that herein they will not suffer the other House to exert any power but that of rejecting; they will not permit the least alteration or amendment to be made by the Lords to the mode of taxing the people by a money bill. [170]

[With regard to the elections of knights, citizens, and burgesses [170], the qualifications of the electors and of the persons to be elected, and the method of proceeding in elections, the student is referred, in addition to the text of our author, to 1 Broom and Hadley's Commentaries, *204 *et seq.*]

2. See U. S. Const., art. 1, sec. 7, cl. 1; Id., sec. 8, cl. 1.

VI. **The method of making laws is much the same in both Houses,** and I shall touch it very briefly, beginning in the House of Commons. [181] For despatch of business each House of parliament has its **Speaker.** The Speaker of the House of Lords, whose office it is to preside there and manage the formality of business, is the Lord Chancellor, or Keeper of the King's Great Seal, or any other appointed by the king's commission; and if none be so appointed, the House of Lords (it is said) may elect. The Speaker of the House of Commons is chosen by the House, but must be approved by the king. And herein the usage of the two Houses differs, that the Speaker of the House of Commons cannot give his opinion or argue any question in the House [except upon committee of the whole]; but the Speaker of the House of Lords, if a lord of parliament, may.

In each House the act of the majority binds the whole, and this majority is declared by votes openly and publicly given.

To bring a bill into the House, if the relief sought by it is of a private nature, it is first necessary to prefer a petition, which must be presented by a member, and usually sets forth the grievance desired to be remedied. This petition (when founded on facts that may be in their nature disputed) is referred to a committee of members, who examine the matter alleged, and accordingly report it to the House; and then (or otherwise, upon the mere petition) leave is given to bring in the bill. **In public matters the bill is brought in upon motion made to the House, without any petition at all.**

The persons directed to bring in the bill present it in a competent time to the House drawn out on paper, with a multitude of blanks or void spaces where anything occurs that is dubious or necessary to be settled by the parliament itself (such especially as the precise date of times, the nature and quantity of penalties, or of any sums of money to be raised), being indeed only the skeleton of the bill. [182] In the House of Lords, if the bill begins there, it is (when of a private nature) referred to two of the judges to examine and report the state of the facts alleged, to see that

all necessary parties consent, and to settle all points of technical propriety. **This is read a first time, and at a convenient distance a second time**; and after each reading the Speaker opens to the House the substance of the bill, and puts the question whether it shall proceed any farther. The introduction of the bill may be originally opposed, as the bill itself may at either of the readings; and if the opposition succeeds, the bill must be dropped for that session, as it must also if opposed with success in any of the subsequent stages.

After the second reading it is committed; that is, referred to a committee, which is either selected by the House in matters of small importance, or else upon a bill of consequence the House resolves itself into a Committee of the whole House. **A Committee of the whole House** is composed of every member, and to form it the Speaker quits the chair (another member being appointed chairman), and may sit and debate as a private member. In these committees the bill is debated clause by clause, amendments made, the blanks filled up, and sometimes the bill entirely new modelled. **After it has gone through the committee the Chairman reports it to the House**, with such amendments as the committee have made, and then the House reconsiders the whole bill again, and the question is repeatedly put upon every clause and amendment. [183] When the House hath agreed or disagreed to the amendments of the committee, and sometimes added new amendments of its own, the bill is then ordered to be **engrossed**, or written in a strong gross hand on one or more long rolls (or presses) of parchment sewed together. When this is finished **it is read a third time**, and amendments are sometimes then made to it; and if a new clause be added, it is done by tacking a separate piece of parchment on the bill, which is called a **rider**. **The Speaker then again opens the contents, and holding it up in his hands, puts the question whether the bill shall pass.** If this is agreed to, **the title** to it is then settled. **After this one of the members is directed to carry it to the Lords** and desire their concurrence, who, attended by several more, carries it to the bar

of the House of Peers, and there delivers it to their Speaker, who comes down from his woolsack to receive it.

It there passes through the same forms as in the other House (except engrossing, which is already done), and if rejected no more notice is taken, but it passes *sub silentio*, to prevent unbecoming altercations. But if it is agreed to, the Lords send a message by two masters in chancery (or, upon matters of high dignity or importance, by two of the judges) that they have agreed to the same, and the bill remains with the Lords if they have made no amendment to it. **But if any amendments are made, such amendments are sent down with the bill to receive the concurrence of the Commons.** If the Commons disagree to the amendments, a **conference** usually follows between members deputed from each House, who for the most part settle and adjust the difference; but if both Houses remain inflexible the bill is dropped. **If the Commons agree to the amendments the bill is sent back to the Lords** by one of the members, with a message to acquaint them therewith. [184] The same forms are observed, *mutatis mutandis*, when the bill begins in the House of Lords.[3] But when an **act of grace or pardon** is passed, it is first signed by his Majesty, and then read once only in each of the Houses without any new engrossing or amendment. And when both Houses have done with any bill it always is deposited in the House of Peers to wait the royal assent, except in the case of a bill of supply, which, after receiving the concurrence of the Lords, is sent back to the House of Commons.

The royal assent may be given two ways: 1. **In person,** when the king comes to the House of Peers in his crown and royal robes, and, sending for the Commons to the bar, the titles of all the bills that have passed both houses are read, and the king's answer is declared by the clerk of the parliament in Norman-French. 2. By the statute 33 Hen. VIII. c. 21, the king may give his assent **by letters patent under his great seal, signed with his hand,** and notified in

3. See generally as to the enactment of laws in this country, Cooley's Const. Lim., ch. 6.

his absence to both Houses assembled together in the high House. [185] And when the bill has received the royal assent in either of these ways it is then, and not before, a statute or act of parliament.

This statute or act is placed among the records of the kingdom, there needing no formal promulgation to give it the force of a law, because every man in England is, in judgment of law, party to the making of an act of parliament, being present thereat by his representatives. However, a copy thereof is usually printed at the king's press for the information of the whole land.

An act of parliament thus made is the exercise of the highest authority that this kingdom acknowledges upon earth. It hath power to bind every subject in the land and the dominions thereunto belonging, — nay, even the king himself if particularly named therein. And it cannot be altered, amended, dispensed with, suspended, or repealed, but in the same forms and by the same authority of parliament. [186]

VII. **An adjournment is no more than a continuance of the session from one day to another,** as the word itself signifies, and this is done by the authority of each House separately every day, and sometimes for a fortnight or a month together. But the adjournment of one House is no adjournment of the other.[4] Prorogation puts an end to the session, and then such bills as are only begun and not perfected must be resumed *de novo* (if at all) in a subsequent session, whereas after an adjournment all things continue in the same state as at the time of the adjournment made, and may be proceeded on without any fresh commencement.

A prorogation is the continuance of the parliament from one session to another,[5] as an adjournment is a continuation of the session from day to day. [187] This is done by the royal authority, expressed either by the Lord Chancellor in his Majesty's presence, or by commission from the crown,

4. See U. S. Const., art. 1, sec. 3, art. 2, sec. 3; People v. Hatch, 33 Ill. 9; Cooley's Const. Lim., *132.

5. Not the practice in this country.

or frequently by proclamation. Both Houses are necessarily prorogued at the same time, it not being a prorogation of the House of Lords or Commons, but of the parliament. The session is never understood to be at an end until a prorogation, though unless some act be passed or some judgment given in parliament, it is in truth no session at all.

A dissolution is the civil death of the parliament and this may be effected three ways:—

1. **By the king's will,** expressed either in person or by representation.

2. **A parliament may be dissolved by the demise of the crown.** [188] This dissolution formerly happened immediately upon the death of the reigning sovereign. But the calling a new parliament immediately on the inauguration of the successor being found inconvenient, and dangers being apprehended from having no parliament in being in case of a disputed succession, it was enacted by the statutes 7 and 8 W. III. c. 15, and 6 Anne, c. 7, that the parliament in being shall continue for six months after the death of any king or queen, unless sooner prorogued or dissolved by the successor; that if the parliament be at the time of the king's death separated by adjournment or prorogation, it shall, notwithstanding, assemble immediately; and that if no parliament is then in being, the members of the last parliament shall assemble and be again a parliament.

3. **Lastly, a parliament may be dissolved or expire by length of time.** [189] As our constitution now stands, the parliament must expire, or die a natural death, at the end of every seventh year, if not sooner dissolved by the royal prerogative.

CHAPTER III.

Of the King and His Title.

The supreme executive power of these kingdoms is vested by our laws in a single person, the king or queen, for it matters not to which sex the crown descends, but the person entitled to it, whether male or female, is immediately invested with all the ensigns, rights, and prerogatives of sovereign power. [190]

The grand fundamental maxim upon which the jus coronæ, or right of succession to the throne of these kinddoms, depends, I take to be this: "that the crown is, by common law and constitutional custom, hereditary, and this in a manner peculiar to itself; but that the right of inheritance may from time to time be changed or limited by act of parliament, under which limitations the crown still continues hereditary." [191]

1. First, **it is in general hereditary,** or descendible to the next heir, on the death or demise of the last proprietor.

2. Secondly, **as to the particular mode of inheritance, it in general corresponds with the feodal path of descents,** chalked out by the common law in the succession to landed estates, yet with one or two material exceptions. [193] Among the females, the crown descends by right of primogeniture to the eldest daughter only and her issue, and not, as in common inheritances, to all the daughters at once. [194] On failure of lineal descendants, the crown goes to the next collateral relations of the late king, provided they are lineally descended from the blood royal. But herein there is no objection (as in the case of common descents) to the succession of a brother, an uncle, or other collateral relation, of the *half* blood, provided only that the one ancestor, from whom both are descended, be that from whose veins the blood royal is communicated to each. [195]

3. **The doctrine of hereditary right does by no means imply an indefeasible right to the throne.** It is unquestionably in the breast of the supreme legislative authority of this kingdom, the king and both houses of parliament, to defeat this hereditary right, and, by particular entails, limitations, and provisions, to exclude the immediate heir, and vest the inheritance in any one else.

4. **But, fourthly, however, the crown may be limited or transferred, it still retains its descendible quality, and becomes hereditary in the wearer of it.** [196] And hence in our law the king is said never to die, in his political capacity, though, in common with other men, he is subject to mortality in his natural; because immediately upon the natural death of Henry, William, or Edward, the king survives in his successor.

CHAPTER IV.

OF THE KING'S ROYAL FAMILY.

The queen of England is either queen regent, queen consort, or queen dowager. [218]

The queen regent, regnant, or sovereign, is she who holds the crown in her own right; and such a one has the same powers, prerogatives, rights, dignities, and duties, as if she had been a king.

The queen consort is the wife of the reigning king; and she, by virtue of her marriage, is participant of divers prerogatives above other women.

And first, she is a public person, exempt and distinct from the king, and not, like other married women, so closely connected as to have lost all legal or separate existence so long as the marriage continues. For the queen is of ability to purchase lands and to convey them, to make leases, to grant copyholds, and do other acts of ownership without the concurrence of her lord, which no other married woman can do. She is also capable of taking a grant from the king, which no other wife is from her husband. The queen of England hath separate courts and offices distinct from the king's, not only in matters of ceremony, but even of law; and her attorney and solicitor general are entitled to a place within the bar of his majesty's courts, together with the king's counsel. [219] She may likewise sue and be sued alone, without joining her husband. She may also have a separate property in goods, as well as lands, and has a right to dispose of them by will. In short, she is in all legal proceedings looked upon as a *feme sole*, and not as a *feme covert*, as a single, not as a married woman.

The queen hath also many exemptions and minute prerogatives. For instance, she pays no toll, nor is she liable to any amercement in any court. But in general unless where the law has expressly declared her exempted, she is upon the same footing with other subjects, being to all intents and purposes the king's subject, and not his equal.

But farther, though the queen is in all respects a subject, yet in point of the security of her life and person, she is put on the same footing with the king. [222] It is equally treason (by the statute 25 Edw. III.) to compass or imagine the death of our lady the king's companion, as of the king himself; and to violate, or defile the queen consort, amounts to the same high crime, as well in the person committing the fact, as in the queen herself, if consenting.

The husband of a queen regnant is her subject, and may be guilty of high treason against her; but in the instance of conjugal infidelity, he is not subjected to the same penal restrictions. [223]

A queen dowager is the widow of the king, and as such enjoys most of the privileges belonging to her as queen consort. But it is not high

treason to conspire her death or to violate her chastity, because the succession to the crown is not thereby endangered. Yet still, *pro dignitate regali*, no man can marry a queen dowager without special license from the king, on pain of forfeiting his lands and goods. But she, though an alien born, shall still be entitled to dower after the king's demise, which no other alien is. A queen dowager, when married again to a subject, doth not lose her regal dignity, as peeresses dowager do their peerage when they marry commoners.

The Prince of Wales, or heir apparent to the crown, and also his royal consort and the princess royal, or eldest daughter of the king, are likewise peculiarly regarded by the laws. For by statute 25 Edw. III. to compass or conspire the death of the former, or to violate the chastity of either of the latter, are as much high treason as to conspire the death of the king or violate the chastity of the queen.

The younger sons and daughters of the king, and other branches of the royal family who are not in the immediate line of succession, were little farther regarded by the ancient law than to give them to a certain degree precedence before all peers and public officers, as well ecclesiastical as temporal. [224] In 1718, upon a question referred to all the judges by King George I., it was resolved, by the opinion of ten against the other two, that the education and care of all the king's grandchildren while minors did belong of right to his Majesty, as king of this realm, even during their father's life. [225] But they all agreed that the care and approbation of their marriages, when grown up, belonged to the king their grandfather. And the judges have more recently concurred in opinion that this care and approbation extend also to the presumptive heir of the crown; though to what other branches of the royal family the same did extend, they did not find precisely determined. The most frequent instances of the crown's interposition go no farther than nephews and nieces; but examples are not wanting of its reaching to more distant collaterals. [226]

CHAPTER V.

OF THE COUNCILS BELONGING TO THE KING.

1. **The first of these is the high court of parliament,** whereof we have already treated at large. [227]

2. **Secondly, the peers of the realm are by their birth heredity counselors of the crown,** and may be called together by the king to impart their advice in all matters of importance to the realm, either in time of parliament or (which hath been their principal use) when there is no parliament in being. [Obsolete.]

Besides this general meeting, it is usually looked upon to be the right of each particular peer of the realm to demand an audience of the king, and to lay before him with decency and respect such matters as he shall judge of importance to the public weal. [228]

3. **A third council belonging to the king are, according to Sir Edward Coke, his judges of the courts of law for law matters.** [229]

4. **But the principal council belonging to the king is his privy council,** which is generally called by way of eminence *the council.* And this is a noble, honorable, and reverend assembly of the king and such as he wills to be of his privy council in the king's court or palace. The king's will is the sole constituent of a privy counselor, and this also regulates their number. Privy counselors are *made* by the king's nomination without either patent or grant, and on taking the necessary oaths they become immediately privy counselors during the life of the king that chooses them, but subject to removal at his discretion. [230]

[As to the qualifications, duty, functions, power, and privileges of the privy council, the student is referred to 1 Broom & Hadley's Commentaries, *272 *et seq.*, and to the English statutes upon the subject passed since the time of our author.]

The dissolution of the privy council depends upon the king's pleasure, and he may, whenever he thinks proper, discharge any particular member, or the whole of it, and appoint another. [232] By the common law, also, it was dissolved *ipso facto* by the king's demise, as deriving all its authority from him. But now, to prevent the inconvenience of having no council in being at the accession of a new prince, it is enacted by statute 6 Anne, c. 7, that the privy council shall continue for six months after the demise of the crown, unless sooner determined by the successor.

CHAPTER VI.

OF THE KING'S DUTIES.

The principal duty of the king is to govern his people according to law. [233]

As to the terms of the original contract between king and people, these I apprehend to be now couched in the **coronation oath,** which by the statute 1 W. and M. st. 1, c. 6, is to be administered to every king and queen who shall succeed to the imperial crown of these realms by one of the archbishops or bishops of the realm in the presence of all the people, who on their parts do reciprocally take the oath of allegiance to the Crown. [235] This coronation oath is conceived in the following terms:—

The archbishop or bishop shall say: "Will you solemnly promise and swear to govern the people of this kingdom of England and the dominions thereto belonging according to the statutes in parliament agreed on and the laws and customs of the same?" *The king or queen shall say:* "I solemnly promise so to do."—*Archbishop or bishop.* "Will you to your power cause law and justice in mercy to be executed in all your judgments?"—*King or queen.* "I will."—*Archbishop or bishop.* "Will you to the utmost of your power maintain the laws of God, the true profession of the gospel, and the Protestant Reformed religion established by the law? And will you preserve unto the bishops and clergy of this realm, and to the churches committed to their charge, all such rights and privileges as by law do or shall appertain unto them or any of them?" —*King or queen.* "All this I promise to do." *After this the king or queen, laying his or her hand upon the holy gospels, shall say:* "The things which I have here before promised I will perform and keep, so help me God," *and then shall kiss the book.*

CHAPTER VII.

OF THE KING'S PREROGATIVE.

By the word prerogative we usually understand that special pre-eminence which the king hath over and above all other persons, and out of the ordinary course of the common law, in right of his regal dignity. It signifies in its etymology (from *prae* and *rogo*) something that is required or demanded before or in preference to all others. [239]

Prerogatives are either direct or incidental. The **direct** are such positive, substantial parts of the royal character and authority as are rooted in and spring from the king's political person, considered merely by itself, without reference to any other extrinsic circumstance, as the right of sending ambassadors, of creating peers, and of making war or peace. [240] But such prerogatives as are **incidental** bear always a relation to something else distinct from the king's person, and are indeed only exceptions in favor of the crown to those general rules that are established for the rest of the community, such as that no costs shall be recovered against the king; that the king can never be a joint-tenant; and that his debt shall be preferred before a debt to any of his subjects. We will at present only dwell upon the king's substantive or direct prerogatives.

These substantive or direct prerogatives may again be divided into three kinds: being such as regard, first, **the king's royal character;** secondly, **his royal authority;** and lastly, **his royal income.** These are necessary to secure reverence to his person, obedience to his commands, and an affluent supply for the ordinary expenses of government.

In the present chapter we shall only consider the two first of these divisions, which relate to the king's political *character* and *authority;* or, in other words, his *dignity* and regal *power;* to which last the name of prerogative is frequently narrowed and confined. [241]

First, then, of the royal dignity.

I. And first, the law ascribes to the king the attribute of sovereignty, or pre-eminence.

Hence it is that no suit or action can be brought against the king, even in civil matters, because no court can have jurisdiction over him. For all jurisdiction implies superiority of power.[1] [242]

1. No action can be brought against the United States or a state except as prescribed by statute or constitution.

Hence it is likewise, that by law the person of the king is sacred, even though the measures pursued in his reign be completely tyrannical and arbitrary, for no jurisdiction upon earth has power to try him in a criminal way, much less to condemn him to punishment.

Are then, it may be asked, the subjects of England totally destitute of remedy in case the crown should invade their rights, either by private injuries or public oppressions? [243] To this we may answer, that the law has provided a remedy in both cases.

And first, as to private injuries: if any person has, in point of property, a just demand upon the king, he must petition him in his court of chancery, where his chancellor will administer right as a matter of grace, though not upon compulsion.

Next, as to cases of ordinary public oppression, where the vitals of the constitution are not attacked, the law hath also assigned a remedy. [244] For as a king cannot misuse his power without the advice of evil counsellors, and the assistance of wicked ministers, these men may be examined and punished. The constitution has therefore provided, by means of **indictments** and **parliamentary impeachments,** that no man shall dare to assist the crown in contradiction to the laws of the land. The supposition of *law* is, that neither the king nor either house of parliament, collectively taken, is capable of doing any wrong, since in such cases the law feels itself incapable of furnishing any adequate remedy. [245] For which reason all oppressions which may happen to spring from any branch of the sovereign power must necessarily be out of the reach of any *stated rule* or *express legal* provision; but if ever they unfortunately happen, the prudence of the times must provide new remedies upon new emergencies.

II. **Besides the attribute of sovereignty, the law also ascribes to the king, in his political capacity, absolute perfection.** [246] **The king can do no wrong:** which ancient and fundamental maxim is not to be understood as if everything transacted by the government was of course just and lawful, but means only two things. First, that whatever is exceptionable in the conduct of public affairs is not to be imputed to the king, nor is he answerable for it personally to his people. And, secondly, it means that the prerogative of the crown extends not to do any injury, it is created for the benefit of the people, and therefore cannot be exerted to their prejudice.

The king, moreover, is not only incapable of doing wrong, but even of thinking wrong; he can never mean to do an improper thing; in him is no folly or weakness. And, therefore if the crown should be induced to grant any franchise or privilege to a subject contrary to reason, or in any wise prejudicial to the commonwealth or a private person, the law will not suppose the king to have meant either an unwise or an injurious action, but declares that the king was deceived in his grant, and thereupon such grant is rendered void, merely upon the foundation of fraud

and deception, either by or upon those agents whom the crown has thought proper to employ.

In farther pursuance of this principle, the law also determinates that **in the king can be no negligence** or *lashes*, and therefore no delay will bar his right. *Nullum tempus occurrit regi*[2] has been the standing maxim upon all occasions.

In the king also can be no stain or corruption of blood; for if the heir to the crown were attainted of treason or felony, and afterwards the crown should descend to him, this would purge the attainder *ipso facto*. [248] **Neither can the king in judgment of law, as king, ever be a minor or under age,** and therefore his royal grants and assents to acts of parliament are good, though he has not in his natural capacity attained the legal age of twenty-one. It hath also been usually thought prudent, when the heir apparent has been very young, to appoint a **protector, guardian, or regent** for a limited time. But the very necessity of such extraordinary provision is sufficient to demonstrate the truth of that maxim of the common law, that in the king is no minority, and therefore he hath no legal guardian.

III. **A third attribute of the king's majesty is his perpetuity.** The law ascribes to him in his political capacity an absolute immortality. The king never dies. [249] Henry, Edward, or George may die, but the king survives them all. For immediately upon the decease of the reigning prince in his natural capacity, his kingship or imperial dignity, by act of law, without any *interregnum* or interval, is vested at once in his heir, who is, *eo instanti*, king to all intents and purposes.

We are next to consider those branches of the royal prerogative which invest thus our sovereign lord, thus all-perfect and immortal in his kingly capacity, with a number of authorities and powers, in the exertion whereof consists the **executive part of government.** [250] The king of England is not only the chief, but properly the **sole, magistrate of the nation,** all others acting by commission from and in due subordination to him. In the exertion of lawful prerogative the king is and ought to be **absolute;** that is, so far absolute that there is no legal authority that can either delay or resist him. He may reject what bills [now obsolete], may make what treaties, may coin what money, may create what peers, may pardon what offences he pleases, unless where the constitution hath expressly, or by evident consequence, laid down some exception or boundary, declaring that thus far the prerogative shall go, and no farther.

2. No time bars the king. In this country the state is not barred by any statute of limitations unless included therein by express words.

In the exertion, therefore, of those prerogatives which the law has given, the king is irresistible and absolute, according to the forms of the constitution. And yet, if the consequence of that exertion be manifestly to the grievance or dishonor of the kingdom, the parliament will call his advisers to a just and severe account. [252]

The prerogatives of the crown (in the sense under which we are now considering them) respect either this nation's intercourse with foreign nations, or its own domestic government and civil polity.

With regard to foreign concerns, the king is the delegate or representative of his people. What is done by the royal authority, with regard to foreign powers, is the act of the whole nation; what is done without the king's concurrence is the act only of private men.

I. **The king, therefore, considered as the representative of his people, has the sole power of sending ambassadors to foreign states and receiving ambassadors at home.**[3] [253]

The rights, the powers, the duties, and the privileges of ambassadors are determined by the law of nature and nations, and not by any municipal constitutions. For, as they represent the persons of their respective masters, who owe no subjection to any laws but those of their own country, their actions are not subject to the control of the private law of that state wherein they are appointed to reside. If they grossly offend, or make an ill use of their character, they may be sent home and accused before their master, who is bound either to do justice upon them or avow himself the accomplice of their crimes. As to whether this exemption of ambassadors extends to all crimes, as well natural as positive, or whether it only extends to such as are *mala prohibita,* as coining, and not to those that are *mala in se,* as murder, the general practice of this country, as well as of the rest of Europe, seems now to be, that the security of ambassadors is of more importance than the punishment of a particular crime.[4] [254]

3. The U. S. constitution provides, art. 2, sec. 2, that the president "shall nominate and by and with the advice and consent of the senate, shall appoint ambassadors, other public ministers, and consuls." See Wilson's Int. Law, 162 *et seq.*

4. Wilson's Int. Law, 169, 170.

In respect to civil suits, all the foreign jurists agree that neither an ambassador, nor any of his train or *comites,* can be prosecuted for any debt or contract in the courts of that kingdom wherein he is sent to reside.[5]

II. **It is also the king's prerogative to make treaties, leagues, and alliances with foreign states and princes.**[6] [257] For it is by the law of nations essential to the goodness of a league that it be made by the sovereign power, and then it is binding upon the whole community; and in England the sovereign power, *quoad hoc,* is vested in the person of the king.

III. **Upon the same principle the king has also the sole prerogative of** making war and peace.[7] So that, in order to make a war completely effectual, it is necessary with us in England that it be publicly declared and duly proclaimed by the king's authority; and then all parts of both the contending nations, from the highest to the lowest, are bound by it. [258] And wherever the right resides of beginning a national war, there also must reside the right of ending it, or the power of making peace.

IV. But as the delay of making war may sometimes be detrimental to individuals who have suffered by depredations from foreign potentates, our laws have in some respects armed the subject with powers to impel the prerogative, by directing the ministers of the crown to issue **letters of marque and reprisal** upon due demand, the prerogative of granting which is nearly related to, and plainly derived from, that other of making war,—this being indeed only an incomplete state of hostilities, and generally ending in a formal declaration of war. These letters are grantable by the law of nations whenever the subjects of one state are oppressed and injured by those of another, and justice is denied by that state to which the oppressor belongs. In this case letters of marque and reprisal (words used as synonymous, and signifying, the latter a taking in return, the former the passing the frontiers in order to such taking) may be obtained, in order to seize the bodies or goods of the subjects of

5. Wilson's Int. Law, 170.

6. "He [the president] shall have power by and with the advice and consent of the senate to make treaties, provided two-thirds of the senators present consent." U. S. Const., art. 2, sec. 2; Wilson's Int. Law, 194.

7. In the United States Congress alone has the power to declare war. U. S. Const., art. 1, sec. 8, cl. 11. A wise and most salutary provision.

the offending state, until satisfaction be made, wherever they happen to be found.[8] [259]

V. **Upon exactly the same reason stands the prerogative of granting safe-conducts,** without which by the law of nations no member of one society has a right to intrude into another. It is left in the power of all states to take such measures about the admission of strangers as they think convenient, those being ever excepted who are driven on the coasts by necessity, or by any cause that deserves pity or compassion. Great tenderness is shown by our laws, not only to foreigners in distress, but with regard also to the admission of strangers who come spontaneously. For so long as their nation continues at peace with ours, and they themselves behave peaceably, they are under the king's protection, though liable to be sent home whenever the king sees occasion. [260] But no subject of a nation at war with us can, by the law of nations, come into the realm, nor can travel himself upon the high seas, or send his goods and merchandise from one place to another, without danger of being seized by our subjects, unless he has letters of safe-conduct, which by divers ancient statutes must be granted under the king's great seal and enrolled in chancery, or else are of no effect, the king being supposed the best judge of such emergencies as may deserve exception from the general law of arms. But **passports** under the king's sign-manual, or **licenses from his ambassadors abroad,** are now more usually obtained, and are allowed to be of equal validity.

These are the principal prerogatives of the king respecting this nation's intercourse with foreign nations. But in domestic affairs he is considered in a great variety of characters, and from thence there arises an abundant number of other prerogatives.

I. **First, he is a constituent part of the supreme legislative power, and, as such, has the prerogative of rejecting such provisions in parliament as he judges improper to be passed.** [Now obsolete.] The king is not bound by any act of parliament unless he be named therein by special and particular words. The most general words that can be devised ("any person or persons, bodies politic, or corporate," &c.) affect not him in the least, if they may tend to restrain or diminish any of his rights or interests. [262] Yet, where an act of parliament is expressly made for the preservation of public rights and the suppression of public wrongs, and does not interfere with the established rights of the crown, it is said to be binding as well upon the king as upon the subject; and, likewise, the king may take the benefit of any particular act, though he be not especially named.

II. **The king is considered as the generalissimo, or the first in military command, within the kingdom.**[9] In this capacity, therefore, of general

8. By the Const. of the U. S., art. 1, § 10, no state shall grant letters of marque and reprisal. This power is vested in Congress, art. 1, § 8.

9. See U. S. Const., art. 2, § 2.

of the kingdom, the king has the sole power of raising and regulating fleets and armies.

It is partly upon the same, and partly upon a fiscal foundation, to secure his marine revenue, that **the king has the prerogative of appointing ports and havens,** or such places only, for persons and merchandise to pass into and out of the realm, as he in his wisdom sees proper. [264]

The erection of beacons, lighthouses, and sea-marks is also a branch of the royal prerogative.

To this branch of the prerogative may also be referred the power vested in his Majesty, by statutes 12 Car. II. c. 4, and 29 Geo. II. c. 16, **of prohibiting the exportation of arms or ammunition** out of this kingdom, under severe penalties; and likewise the right which the king has, whenever he sees proper, of **confining his subjects to stay within the realm, or of recalling them when beyond the seas.** [265] By the common law every man may go out of the realm for whatever cause he pleaseth, without obtaining the king's leave, provided he is under no injunction of staying at home. And at present everybody has, or at least assumes, the liberty of going abroad when he pleases. [266] Yet undoubtedly if the king, by **writ of ne exeat regnum,** under his great seal or privy seal, thinks proper to prohibit him from so doing, or if the king sends a writ to any man, when abroad, commanding his return, and in either case the subject disobeys, it is a high contempt of the king's prerogative.

III. Another capacity, in which the king is considered in domestic affairs, is as the **foundation of justice and general conservator of the peace** of the kingdom. By the fountain of justice, the law does not mean the *author* or *original*, but only the *distributor*. Justice is not derived from the king as from his *free gift*, but he is the steward of the public to dispense it to whom it is *due*. He is not the spring, but the reservoir from whence right and equity are conducted by a thousand channels to every individual. He has alone the right of erecting courts of judicature; for, though the constitution of the kingdom hath intrusted him with the whole executive power of the laws, it is impossible, as well as improper, that he should personally carry into execution this great and extensive trust; it is consequently necessary that courts should be erected to assist him in executing this power, and equally necessary that, if erected, they should be erected by his authority. [267] And hence it is, that all jurisdictions of courts are either mediately or immediately derived from the crown, their proceedings run generally in the king's name, they pass under his seal, and are executed by his officers.

It is probable, and almost certain, that in very early times, before our constitution arrived at its full perfection, our kings in person often heard and determined causes between party and party. But at present, by the long and uniform usage of many ages, **our kings have delegated their whole judicial power to the judges** of their several courts, which are the grand depositaries of the fundamental laws of the kingdom and have gained a known and stated jurisdiction, regulated by certain and estab-

lished rules, which the crown itself cannot now alter but by act of parliament.

And in order to maintain both the dignity and independence of the judges in the superior courts, it is enacted by the statute 13 W. III. c. 2, that **their commissions shall be made** (not, as formerly, *durante bene placito,*[1] but) **quamdiu bene se gesserint,**[2] and their salaries ascertained and established, but that it may be lawful to remove them on the address of both houses of parliament. And now, by the noble improvements of that law, in the statute of 1 Geo. III. c. 23, enacted at the earnest recommendation of the king himself from the throne, the judges are continued in their offices during their good behavior, notwithstanding any demise of the crown (which was formerly held immediately to vacate their seats), and their full salaries are absolutely secured to them during the continuance of their commissions.[3] [268]

In criminal proceedings, or prosecutions for offenses, it would still be a higher absurdity if the king personally sat in judgment, because, in regard to these, he appears in another capacity, that of *prosecutor.* All offences are either against the king's peace or his crown and dignity, and are so laid in every indictment. And hence also arises another branch of the prerogative, that of **pardoning** offences; for it is reasonable that he only who is injured should have the power of forgiving.[4] [269]

A consequence of this prerogative is the **legal ubiquity of the king.** [270] His Majesty in the eye of the law is always present in all his courts, though he cannot personally distribute justice. And from this ubiquity it follows that the king can never be nonsuit, for a nonsuit is the desertion of the suit or action by the non-appearance of the plaintiff in court. For the same reason also, in the forms of legal proceedings, the king is not said to appear *by his attorney* as other men do, for in contemplation of law he is always present in court.

From the same original, of the king's being the foundation of justice,

1. At will (of the king).

2. During good behavior.

3. In the Federal Courts and in Massachusetts the judges hold during good behavior; but in other states, they are elected for varying terms of years.

4. The pardoning power, with us is vested in the president of the United States and in the governors of the several states. See Cooley's Const. Lim., *115, 116, and notes.

we may also deduce **the prerogative of issuing proclamations,** which is vested in the king alone. These proclamations have then a binding force when they are grounded upon and enforce the laws of the realm. For though the making of laws is entirely the work of a distinct part, the legislative branch, of the sovereign power, yet the manner, time, and circumstances of putting those laws in execution must frequently be left to the discretion of the executive magistrate. And therefore his constitutions or edicts concerning these points, which we call proclamations, are binding upon the subjects where they do not either contradict the old laws or tend to establish new ones, but only enforce the execution of such laws as are already in being in such manner as the king shall judge necessary.

IV. **The king is likewise the fountain of honor, of office, and of privilege,** and this in a different sense from that wherein he is styled the fountain of justice, for here he is really the parent of them. [271] **All degrees of nobility,** of knighthood, and other titles, are received by immediate grant from the crown; either expressed in writing by writs or letters-patent, as in the creations of peers and baronets, or by corporeal investiture, as in the creation of a simple knight. [272]

From the same principle also arises the prerogative of erecting and disposing of offices, for honors and offices are in their nature convertible and synonymous. As the king may create new titles, so may he create new offices; but with this restriction, that he cannot create new offices with new fees annexed to them, nor annex new fees to old offices, for this would be a tax upon the subject, which cannot be imposed but by act of parliament.

Upon the same or a like reason the king has also the **prerogative of conferring privileges upon private persons.** Such as granting place of precedence to any of his subjects as shall seem good to his royal wisdom, or such as converting aliens, or persons born out of the king's dominions, into denizens. Such also is the prerogative of erecting corporations [no longer used].

V. **Another light in which the laws of England consider the king with regard to domestic concerns is as the arbiter of commerce.** [273] By commerce I at present mean domestic commerce only.

With us in England the king's prerogative, so far as it relates to mere domestic commerce, will fall principally under the following articles: [274]

First, **the establishment of public marts,** or places of buying and selling, such as markets and fairs, with the tolls thereunto belonging. These can only be set up by virtue of the king's grant or by long and immemorial usage and prescription, which presupposes such a grant.

Secondly, **the regulation of weights and measures.**[5]

5. In England this power is exercised by parliament. In the United States it belongs to Congress. **Const.** U. S., art. 1, § 8.

Thirdly, **as money is the medium of commerce, it is the king's prerogative, as the arbiter of domestic commerce, to give it authority or make it current.**[6] [276]

The coining of money is in all states the act of the sovereign power, that its value may be known on inspection. [277] And with respect to coinage in general, there are three things to be considered therein: the **materials,** the **impression,** and the **denomination.**

With regard to the materials, Sir Edward Coke lays it down that the money of England must either be of **gold or silver;** and none other was ever issued by the royal authority till 1672, when copper farthings and halfpence were coined by King Charles the Second, and ordered by proclamation to be current in all payments under the value of sixpence, and not otherwise.

As to the impression, the stamping thereof is the unquestionable prerogative of the crown.

The denomination, or the value for which the coin is to pass current, is likewise in the breast of the king, and if any unusual pieces are coined, that value must be ascertained by proclamation. [278] In order to fix the value, the weight and the fineness of the metal are to be taken into consideration together. When a given weight of gold or silver is of a given fineness, it is then of the true standard, and called esterling or sterling metal. And of this sterling or esterling metal all the coin of the kingdom must be made, by the statute 25 Edw. III. c. 13. So that the king's prerogative seemeth not to extend to the debasing or enhancing the value of the coin, below or above the sterling value, though Sir Matthew Hale appears to be of another opinion.

The king may also, by his proclamation, legitimate foreign coin, and make it current here, declaring at what value it shall be taken in payments. But this, I apprehend, ought to be by comparison with the standard of our own coin; otherwise the consent of parliament will be necessary. The king may also at any time decry, or cry down, any coin of the kingdom, and make it no longer current.

VI. **The king is, lastly, considered by the laws of England as the head and supreme governor of the national church.**[7]

In virtue of this authority the king convenes, prorogues, restrains, regulates, and dissolves all ecclesiastical synods or convocations. [279]

From this prerogative also, of being the head of the church, arises the king's right of nomination to vacant bishoprics and certain other ecclesiastical preferments.

As head of the church, the king is likewise the *dernier ressort* in all ecclesiastical causes, an appeal lying ultimately to him in chancery [to the judicial committee of the privy council] from the sentence of every ecclesiastical judge.

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6. See U. S. Const., art. 1, § 8.

7. See U. S. Const. Amend., art. 1.

CHAPTER VIII.

OF THE KING'S REVENUE.

[As to the subjects of the **custody of bishop's temporalities** upon the vacancy of the bishopric [282], **corodies** [283], **tithes** extra-parochial, **first-fruits and tenths** [284], **profits of crown lands** [286], **purveyance and pre-emption** [287], **wine licenses** [288], **profits from the king's forests and profits from the king's ordinary courts of justice**[8] [289], **royal fish** [290], **deodands** (abolished by statute Sept. 1, 1846) [300], the student is referred to the original text and to 1 Broom & Had. Com. *377 *et seq.*]

[As to **wrecks,** which by the ancient common law were where any ship was lost at sea and the goods or cargo were thrown upon land, and which were anciently a branch of the king's maritime revenue, it was held that] not only if any live thing escape, but if proof can be made of the property of any of the goods or lading which come to shore, they shall not be forfeited as wreck. [292] The statute [of Westminster the first] further ordains, that the sheriff of the county shall be bound to keep the goods a year and a day, that if any man can prove a property in them, either in his own right or by right of representation, they shall be restored to him without delay; but, if no such property be proved within that time, they then shall be the king's. If the goods are of a perishable nature, the sheriff may sell them, and the money shall be liable in their stead.

In order to constitute a legal *wreck* the goods must come to land. If they continue at sea, the law distinguishes them by the barbarous and uncouth appellations of *jetsam*, *flotsam*, and *ligan*. **Jetsam** is where goods are cast into the sea, and there sink and remain under water; **flotsam** is where they continue swimming on the surface of the waves; **ligan** is where they are sunk in the sea, but tied to a cork or buoy, in order to be found again. These are also the king's, if no owner appears to claim them; but if any owner appears, he is entitled to recover the possession. For, even if they be cast overboard without any mark or buoy, in order to lighten the ship, the owner is not by this act of necessity construed to have renounced his property; much less can things ligan be supposed to be abandoned, since the owner has done all in his power to assert and retain his property. These three are therefore accounted so far a distinct thing from the former, that by the king's grant to a man of wrecks, things jetsam, flotsam, and ligan will not pass. [293]

By the statute 27 Edw. III. c. 13, if any ship be lost on the shore, and the goods come to land (which cannot, says the statute, be called wreck), they shall be presently delivered to the merchants, paying only a rea-

8. Costs of suit are assessed against the losing party at law with us, but only where authorized by statute.

sonable reward to those that saved and preserved them, which is entitled **salvage.** And by the common law, if any persons (other than the sheriff) take any goods so cast on shore, which are not legal wreck, the owners might have a commission to inquire and find them out, and compel them to make restitution.[8a]

XII. **A twelfth branch of the royal revenue, the right to mines,**[9] has its original from the king's prerogative of coinage, in order to supply him with materials; and therefore those mines which are properly royal, and to which the king is entitled when found, are only those of silver and gold. [294] By the old common law, if gold or silver be found in mines of base metal, according to the opinion of some the whole was a royal mine, and belonged to the king; though others held that it only did so if the quantity of gold or silver was of greater value than the quantity of base metal. But now by the statutes 1 W. and M. st. 1, c. 30, and 5 W. and M. c. 6, this difference is made immaterial, it being enacted that no mines of copper, tin, iron, or lead shall be looked upon as royal mines, notwithstanding gold or silver may be extracted from them in any quantities; but that the king, or persons claiming royal mines under his authority, may have the ore (other than tin-ore in the counties of Devon and Cornwall), paying for the same a price stated in the act. [295]

XIII. **To the same original may in part be referred the revenue of treasure-trove,** called in Latin *thesaurus inventus*, which is where any money or coin, gold, silver, plate, or bullion, is found hidden *in* the earth, or other private place, the owner thereof being unknown, in which case the treasure belongs to the king; but if he that hid it be known, or afterwards found out, the owner, and not the king, is entitled to it. Also if it be found in the sea, or *upon* the earth, it doth not belong to the king, but the finder, if no owner appears. So that it seems it is the *hiding*, and not the *abandoning* of it, that gives the king a property.[1]

XIV. **Waifs, bona waviata, are goods stolen and waived or thrown away by the thief in his flight for fear of being apprehended.** [296] These are given to the king by the law as a punishment upon the owner for not himself pursuing the felon and taking away his goods from him.[2] And therefore, if the party robbed do his diligence immediately to follow and

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8a. For the English statute upon this subject, see 1 Broom & Had. Com., *364 *et seq.* See, also, 4 U. S. Stats. at Large, 115.

9. See Plowd, 336; Stoakes v. Barrett, 5 Cal. 36; Moore v. Shaw, 17 Cal. 199.

1. Completely abandoned or derelict property may be appropriated by those first taking it, subject, however, to such regulation as may be made by statute. See 2 Kent Com., 357; 2 Schoul. Pers. Prop., 9. See, also, the leading case of Armory v. Delamire, 1 Strange, 504; 1 Smith Lead Cases, *470 and notes; Haslem v. Lockwood, 37 Conn. 500.

2. Not the rule in the United States. The larceny does not change the title.

apprehend the thief (which is called making fresh *suit*), or do convict him afterwards or procure evidence to convict him, he shall have his goods again. [297] Waived goods do also not belong to the king till seized by somebody for his use; for if the party robbed can seize them first, though at the distance of twenty years, the king shall never have them. If the goods are hid by the thief, or left anywhere by him so that he had them not about him when he fled, and therefore did not throw them away in his flight, these also are not *bona waviata*, but the owner may have them again when he pleases. The goods of a foreign merchant, though stolen and thrown away in flight, shall never be waifs: the reason whereof may be not only for the encouragement of trade, but also because there is no wilful default in the foreign merchant's not pursuing the thief, he being generally a stranger to our laws, our usages, and our language.

XV. **Estrays are such valuable animals as are found wandering in any manor or lordship, and no man knoweth the owner of them,** in which case the law gives them to the king as the general owner and lord paramount of the soil in recompense for the damage which they may have done therein, and they now most commonly belong to the lord of the manor by special grant from the crown.[3] Any beasts may be estrays that are by nature tame or reclaimable, and in which there is a valuable property, as sheep, oxen, swine, and horses, which we in general call cattle. [298] For animals upon which the law sets no value, as a dog or cat, and animals *ferae naturae*, as a bear or wolf, cannot be considered as estrays. So swans may be estrays, but not any other fowl; whence they are said to be royal fowl. He that takes an estray is bound so long as he keeps it to find it in provisions and preserve it from damage, and may not use it by way of labor, but is liable to an action for so doing. Yet he may milk a cow or the like, for that tends to the preservation and is for the benefit of the animal.

[299] XVI. **Forfeitures of lands and goods for offences;** *bona confiscata*, as they are called by the civilians, because they belong to the *fiscus* or imperial treasury; or, as our lawyers term them, *forisfacta;* that is, such whereof the property is gone away or departed from the owner. The true reason and only substantial ground of any forfeiture for crimes consist in this; that all property is derived from society, being one of those civil rights which are conferred upon individuals, in exchange for that degree of natural freedom which every man must sacrifice when he enters into social communities. If therefore a member of any national community violates the fundamental contract of his association, by transgressing the municipal law, he forfeits his right to such privileges as he claims by that contract; and the state may very justly resume that portion of property, or any part of it, which the laws have before assigned him. Hence, in every offence of an atrocious kind, the

3. A matter of statutory regulation in the United States.

laws of England have exacted a total confiscation of the moveables or personal estate; and in many cases a perpetual, in others only a temporary, loss of the offender's immoveables or landed property; and have vested them both in the king, who is the person supposed to be offended, being the one visible magistrate in whom the majesty of the public resides. The particulars of these forfeitures will be more properly recited when we treat of crimes and misdemeanors.[4]

XVII. **Another branch of the king's ordinary revenue arises from escheats of lands,** which happen upon the defect of heirs to succeed to the inheritance, whereupon they in general revert to and vest in the king, who is esteemed in the eye of the law the original proprietor of all the lands in the kingdom.[5] [302]

XVIII. **The eighteenth and last branch of the king's ordinary revenue consists in the custody of idiots,** from whence we shall be naturally led to consider also the custody of lunatics.

An idiot or natural fool is one that hath had no understanding from his nativity, and therefore is by law presumed never likely to attain any. For which reason the custody of him and of his lands was formerly vested in the lord of the fee, but, by reason of the manifold abuses of this power by subjects, it was at last provided by common consent that it should be given to the king, as the general conservator of his people, in order to prevent the idiot from wasting his estate and reducing himself and his heirs to poverty and distress. [303] This fiscal prerogative of the king is declared in parliament by statute 17 Edw. II. c. 9, which directs (in affirmance of the common law) that the king shall have ward of the lands of natural fools, taking the profits without waste or destruction, and shall find them necessaries; and after the death of such idiots he shall render the estate to the heirs, in order to prevent such idiots from aliening their lands and their heirs from being disinherited.[6] By the old common law there is a writ *de idiota inquirendo* to inquire whether a man be an idiot or not, which must be tried by a jury of twelve men.

A man is not an idiot if he hath any glimmering of reason, so that he can tell his parents, his age, or the like common matters. [304] But a man who is born deaf, dumb, and blind, is looked upon by the law as in the same state with an idiot. [Not now the law.]

A lunatic or non compos mentis is one who hath had understanding, but by disease, grief, or other accident, hath lost the use of his reason. A lunatic is indeed properly one that hath lucid intervals, sometimes en-

4. See Book 4.

5. See escheats under the head real property, *post*.

6. In the United States, where not otherwise prescribed by statute, this jurisdiction together with that over infants and lunatics, is usually exercised by courts of chancery. It is, however, usually regulated by statute. See generally Adams Equity, ch. 6 and notes; Eyre v. Countess of Shaftsbury, 2 White & Tudor's Lead. Cas. Eq., p. i, *693 and notes; Dodge v. Cole, 97 Ill. 338.

joying his senses and sometimes not. But under the general name of *non compos mentis*[7] (which Sir Edward Coke says is the most legal name) are comprised not only lunatics, but persons under frenzies, or who lose their intellects by disease, those that *grow* deaf, dumb, and blind [obsolete], not being born so; or such, in short, as are judged by the court of chancery incapable of conducting their own affairs. To these, also, as well as idiots, the king is guardian, but to a very different purpose. For the law always imagines that these accidental misfortunes may be removed, and therefore only constitutes the crown a trustee for the unfortunate persons, to protect their property and to account to them for all profits received if they recover, or, after their decease, to their representatives.[8]

On the first attack of lunacy or other occasional insanity, while there may be hope of a speedy restitution of reason, it is usual to confine the unhappy objects in private custody under the direction of their nearest friends and relations. [305] But when the disorder is grown permanent, and the circumstances of the party will bear such additional expense, it is proper to apply to the royal authority to warrant a lasting confinement.

The method of proving a person non compos is very similar to that of proving him an idiot. The Lord Chancellor, to whom by special authority from the king the custody of idiots and lunatics is intrusted, upon petition or information grants a commission in nature of the writ *de idiota inquirendo*[9] to inquire into the party's state of mind, and if he be found *non compos* he usually commits the care of his person, with a suitable allowance for his maintenance, to some friend, which is then called **his committee.** However, to prevent sinister practices, the next heir is seldom permitted to be this committee of the person [personal fitness for the office now determines the appointment of the committee, both of the person and estate], because it is his interest that the party should die. But it hath been said there lies not the same objection against his next of kin, provided he be not his heir, for it is his interest to preserve the lunatic's life, in order to increase the personal estate by savings which he or his family may hereafter be entitled to enjoy. The heir is generally made the manager or committee of the estate, it being clearly his interest by good management to keep it in condition, accountable, however, to the court of chancery, and to the *non compos* himself if he recovers, or otherwise to his administrators.[1] With us, when a man on an inquest of idiocy hath been returned an *unthrift* and not an *idiot*, no farther proceedings have been had. [306]

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7. Not of sound mind.

8. See note 3, *supra*.

9. Of inquiry concerning an idiot.

1. Regulated by statute in the United States. Always consult the local statutes. The disabilities of infancy, coverture, insanity, etc., will be considered under the subjects of contracts, criminal law, etc.

Extraordinary grants are usually called by the synonymous names of aids, subsidies, and supplies, and are granted by the Commons of Great Britain in parliament assembled, who, when they have voted a supply to his Majesty and settled the *quantum* of that supply, usually resolve themselves into what is called a Committee of Ways and Means, to consider the ways and means of raising the supply so voted. [307]

[As to the **land tax** [308], the **malt tax** [313], **income tax, customs** [313], **excise duty** [318], the revenue from the **post office** [321], **stamp duties** [323], the **duty upon houses and windows** [324], the **duty upon offices and pensions** [326], **licenses,** &c., the student, besides the references to the author, is referred to 1 Broom & Had. Com. *368 *et seq.*, and to the English Statutes at Large.]

CHAPTER IX.

OF SUBORDINATE MAGISTRATES.

The magistrates and officers, whose rights and duties it will be proper in this chapter to consider, are such as are generally in use and have a jurisdiction and authority dispersedly throughout the kingdom, which are principally **sheriffs, coroners, justices of the peace, constables, surveyors of highways, and overseers of the poor.** [339]

I. **The sheriff** is an officer of very great antiquity in this kingdom, his name being derived from two Saxon words, signifying the reeve, bailiff, or officer of the shire. He is called in Latin *vice-comes*, as being the deputy of the earl or *comes*, to whom the custody of the shire is said to have been committed at the first division of this kingdom into counties. But the earls in process of time, by reason of their high employments and attendance on the king's person, not being able to transact the business of the county, were delivered of that burden, reserving to themselves the honor, but the labor was laid on the sheriff. **So that now the sheriff does all the king's business in the county,** and, though he be still called *vice-comes*, yet he is entirely independent of, and not subject to, the earl, the king by his letters-patent committing *custodiam comitatus*[1] to the sheriff, and him alone.

The power and duty of the sheriff are either as a judge, as the keeper of the king's peace, as a ministerial officer of the superior courts of justice, or as the king's bailiff.

In his judicial capacity he is to hear and determine all causes of forty shillings value and under in his county court, and he has also a judicial power in divers other civil cases. He is likewise to decide the elections of knights of the shire (subject to the control of the House of Commons), of coroners, and of verderors; to judge of the qualification of voters, and to return such as he shall determine to be duly elected.[2]

1. The custody of the county.

2. His judicial powers have been much changed by statute. See 1 Broom & Had. Com., 409. He is usu-

As the keeper of the king's peace, both by common law and special commission, he is the first man in the county. He may apprehend and commit to prison all persons who break the peace or attempt to break it, and may bind any one in a recognizance to keep the king's peace. He may and is bound *ex officio* to pursue and take all traitors, murderers, felons, and other misdoers, and commit them to jail for safe custody. He is also to defend his county against any of the king's enemies when they come into the land; and for this purpose, as well as for keeping the peace and pursuing felons, he may command all the people of his county to attend him, which is called the **posse comitatus,** or power of the county;[3] and this summons every person above fifteen years old and under the degree of a peer is bound to attend upon warning, under pain of fine and imprisonment. [344] But though the sheriff is thus the principal conservator of the peace in his county, yet by the express directions of the Great Charter he, together with the constable, coroner, and certain other officers of the king, are forbidden to hold any pleas of the crown, or, in other words, to try any criminal offence.

In his ministerial capacity the sheriff is bound to execute all process issuing from the king's courts of justice. In the commencement of civil causes he is to serve the writ, to arrest, and to take bail; when the cause comes to trial he must summon and return the jury; when it is determined he must see the judgment of the court carried into execution. In criminal matters he also arrests and imprisons, he returns the jury, he has the custody of the delinquent, and he executes the sentence of the court, though it extend to death itself.[4]

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ally given no judicial power in the United States, except in some states the execution of writs of inquiry upon defaults, i. e., the assessment of damages, etc.

3. He has the same authority in the several states. The office is elective. In the federal courts the United States marshal is the executive officer of the court. This is, however, an appointive office.

4. The duties of the sheriff are in substance the same in the United States except so far as changed by statute.

As the king's bailiff, it is his business to preserve the rights of the king within his bailiwick, for so his county is frequently called in the writs. He must seize to the king's use all lands devolved to the crown by attainder or escheat, must levy all fines and forfeitures, must seize and keep all waifs, wrecks, estrays, and the like, unless they be granted to some subject, and must also collect the king's rents within the bailiwick, if commanded by process from the exchequer.

To execute these various offices the sheriff has under him many inferior officers, — an under-sheriff, bailiffs, and gaolers.[5] [345]

The under-sheriff usually performs all the duties of the office, a very few only excepted, where the personal presence of the high-sheriff is necessary.

Bailiffs, or sheriff's officers, are either bailiffs of hundreds or special bailiffs. Bailiffs of hundreds are officers appointed over those respective districts by the sheriffs to collect fines therein, to summon juries, to attend the judges and justices at the assizes and quarter sessions, and also to execute writs and process in the several hundreds.

Gaolers are also the servants of the sheriff, and he must be responsible for their conduct. [346] Their business is to keep safely all such persons as are committed to them by lawful warrant, and if they suffer any such escape the sheriff shall answer it to the king if it be a criminal matter, or, in a civil case, to the party injured.

II. **The Coroner's** is also a very ancient office at the common law. He is called coroner (*coronator*), because he halth principally to do with pleas of the crown or such wherein the king is more immediately concerned. And in this light the Lord Chief Justice of the King's Bench is the principal coroner in the kingdom, and may if he pleases exercise the jurisdiction of a coroner in any part of the realm. But there are also particular coroners for every county of England, usually four, but sometimes six and sometimes fewer. [347] This office is of equal antiquity with the sheriff, and was ordained together with him to keep the peace when the earls gave up the wardship of the county.

5. Consult the local statutes.

He is still chosen [for life] by the freeholders [of the county or district. 1 Broom & Had. Com. 415].[6]

The office and power of a coroner are also, like those of the sheriff, either judicial or ministerial, but principally judicial. [348] This is in great measure ascertained by statute 4 Edw. I. *de officio coronatoris,*[7] and consists, first, in inquiring when any person is slain, or dies suddenly or in prison, concerning the manner of his death. And this must be "*super visum corporis,*"[8] for if the body be not found the coroner cannot sit. He must also sit at the very place where the death happened,[9] and his inquiry is made by a jury from four, five, or six of the neighboring towns over whom he is to preside. If any be found guilty by this inquest of murder or other homicide he is to commit them to prison for further trial, and is also to inquire concerning their lands, goods, and chattels, which are forfeited thereby; but, whether it be homicide or not, he must inquire whether any deodand [obsolete] has accrued to the king, or the lord of the franchise, by this death, and must certify the whole of this inquisition (under his own seal and the seals of his jurors), together with the evidence thereon, to the court of King's Bench, or the next assizes. [349]

Another branch of his office is to inquire concerning **shipwrecks,** and certify whether wreck or not, and who is in possession of the goods. Concerning **treasure-trove,** he is also to inquire who were the finders, and where it is, and whether any one be suspected of having found and concealed a treasure.

The ministerial office of the coroner is only as the sheriff's substitute. For when just exception can be taken to the sheriff for suspicion of partiality (as that he is interested in the suit, or of kindred to either plaintiff or defendant),

6. It is an elective office in this country.

7. Concerning the office of coroner.

8. Upon a view of the body.

9. It is sufficient if the coroner and jury together view the body and the latter are there sworn in his presence. His duties in this country are very similar to those in England. See the local statutes. As the United States has no common law criminal jurisdiction it has no office corresponding to that of coroner.

the process must then be awarded to the coroner instead of the sheriff for execution of the king's writs.[1]

III. **The next species of subordinate magistrates whom I am to consider are justices of the peace,** the principal of whom is the *custos rotulorum,* or keeper of the records of the county.

The common law hath ever had a special care and regard for the conservation of the peace. And therefore, before the present constitution of justices was invented, there were peculiar officers appointed by the common law for the maintenance of the public peace. Of these, some had and still have this power annexed to other offices which they hold; others had it merely by itself, and were thence named *custodes,* or *conservatores pacis.*[1a] Those that were so, *virtute officii,*[2] still continue, but the latter sort are superseded by the modern justices.

The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions, and may give authority to any other to see the peace kept and to punish such as break it, hence it is usually called the king's peace. [350] **The Lord Chancellor, or Keeper, the Lord Treasurer, the Lord High Steward of England, the Lord Mareschal, the Lord High Constable of England (when any such officers are in being), and all the justices of the court of King's Bench (by virtue of their offices) and the Master of the Rolls (by prescription) are general conservators of the peace** throughout the whole kingdom, and may commit all breakers of it or bind them in recognizances to keep it. **The other judges are only so in their own courts. The coroner** is also a conservator of the peace within his own county, as is **also the sheriff,** and both of them may take a recognizance or security for the peace. **Constables,** tithing-men, and the like, are **also** conservators of the peace within their own jurisdictions, and may apprehend all breakers of the peace and commit them till they find sureties for their keeping it.

Justices [of the peace] are appointed by the king's special commission under the Great Seal,[3] the form of which was settled by all the judges A. D. 1590. This appoints them all, jointly and severally, to keep the peace, and any two or more of them to inquire of and determine felonies and other misdemeanors; in which number some particular justices, or one of them, are directed to be always included, and no

1. So also in this country.
1a. Conservators of the peace.
2. By virtue of his office.
3. Usually elected in this country.

business to be done without their presence; the words of the commission running thus: "*quorum aliquem vestrum, A. B. C. D., &c., unum esse volumus,*"[4] whence the persons so named are usually called justices of the *quorum.*

And formerly it was customary to appoint only a select number of justices eminent for their skill and discretion to be of the *quorum;* but now the practice is to advance all of them to that dignity, naming them all over again in the *quorum* clause;[5] and no exception is now allowable for not expressing in the form of warrants, &c., that the justice who issued them is of the *quorum.* [352] When any justice intends to act under this commission he sues out a writ of *dedimus potestatem*[6] from the clerk of the crown in chancery, empowering certain persons therein named to administer the usual oaths to him, which done, he is at liberty to act.

As the office of these justices [of the peace] is conferred by the king, so it subsists only during his pleasure, and is determinable, 1. **By the demise of the crown;** that is, in six months after. 2. **By express writ under the Great Seal,** discharging any particular person from being any longer justice. 3. **By superseding the commission by writ of supersedeas,** which suspends the power of all the justices, but does not totally destroy it, seeing it may be revived again by another writ called a *procedendo.* 4. **By a new commission,** which virtually though silently discharges all the former justices that are not included therein, for two commissions cannot subsist at once. 5. **By accession of the office of sheriff or coroner** [which disqualifies during the continuance of the new office, but no longer].

The power, office, and duty of a justice of the peace depend on his commission and on the several statutes which have created objects of his jurisdiction. [354] His commission, first, empowers him singly to **conserve the peace;** and thereby gives him all the power of the ancient conservators at the common law, in suppressing riots and affrays, in taking securities for the peace, and in apprehending and committing felons and other inferior criminals. It also empowers any two or more to hear and determine all felonies and other offences; which is the ground of their

4. Of whom we will that some one of you, A. B. C. D., etc., be one.

5. 1 Broom. & Had. Com., 421.

6. We have given authority.

jurisdiction at sessions, of which more will be said in its proper place.[7]

IV. Fourthly, then, of the constable. [355]

The word *constable* is frequently said to be derived from the Saxon, and to signify the support of the king. But as we borrowed the name as well as the office of constable from the French, I am rather inclined to deduce it, with Sir Henry Spelman and Dr. Cowel, from that language, wherein it is plainly derived from the Latin *comes stabuli*, an officer well known in the empire; so called because, like the Great Constable of France, as well as the Lord High Constable of England, he was to regulate all matters of chivalry, tilts, tournaments, and feats of arms which were performed on horseback. This great office of Lord High Constable hath been disused in England, except only upon great and solemn occasions, as the king's coronation and the like, ever since the attainder of Stafford, Duke of Buckingham, under King Henry VIII.; as in France it was suppressed about a century after by an edict of Louis XIII.: but from his office, says Lambard, this lower constableship was first drawn and fetched, and is, as it were, a very finger of that hand. For the statute of Winchester, which first appoints them, directs that, for the better keeping of the peace, two constables in every hundred and franchise shall inspect all matters relating to *arms* and *armor*.

Constables are of two sorts, high constables and petty constables. The former were first ordained by the statute of Winchester, are appointed at the court leets of the franchise or hundred over which they preside, or, in default of that, by the justices at their quarter sessions, and are removable by the same authority that appoints them. [356] The petty constables are inferior officers in every town and parish, subordinate to the high constable of the hundred, first instituted about the reign of Edw. III.

The general duty of all constables, both high and petty, is to keep the king's peace in their several districts; and to

7. In the United States the statutes usually confer upon justices of the peace jurisdiction to try and determine actions at common law, involving small amounts, to try, with the assistance of a jury, petty misdemeanors, and to hold preliminary examinations of persons charged with grave offences. They are also conservators of the peace, as stated in the text. They have no jurisdiction to try felonies. See generally Washburn's Manual of Criminal Law (3d Ed.), ch. 3; Clark's Crim. Procedure, 82.

In England this office is said to be an office of honor without profits; in this country it is too often an office of profit without honor. It is a court of limited jurisdiction and jurisdiction must be shown, or its acts are void. See *post*, courts of record and not of record.

that purpose they are armed with very large powers, of arresting and imprisoning, of breaking open houses, and the like.[8]

V. **Surveyors of the highways.**[9] [357] Every parish is bound of common right to keep the high roads that go through it in good and sufficient repair, unless by reason of the tenure of lands, or otherwise, this care is consigned to some particular private person. From this burthen no man was exempt by our ancient laws, whatever other immunities he might enjoy, this being part of the *trinoda necessitas*, to which every man's estate was subject, viz., *expeditio contra hostem, arcium constructio, et pontium reparatio.* For though the reparation of bridges only is expressed, yet that of roads also must be understood. And indeed now, for the most part, the care of the roads only seems to be left to parishes, that of bridges being in great measure devolved upon the county at large, by statute 22 Hen. VIII. c. 5. If the parish neglected these repairs, they might formerly, as they may still be, indicted for such their neglect, but it was not then incumbent on any particular officer to call the parish together, and set them upon this work; for which reason, by the statute 2 and 3 Ph. and M. c. 8, surveyors of the highways were ordered to be chosen in every parish. [358]

Their office and duty consists in putting in execution a variety of laws for the repairs of the public highways; that is, of ways leading from one town to another [to which statutes the student is referred for further information. Regulated by statute in the United States].

VI. **Overseers of the poor.**[1]

The poor of England, till the time of Henry VIII., subsisted entirely upon private benevolence and the charity of well-disposed Christians. [359]

[But by the statute of 43 Eliz. c. 2, overseers of the poor were to be appointed in every parish, whose office and duty were principally these:] First, to raise competent sums for the necessary relief of the poor, impotent, old, blind, and such other, being poor and not able to work; and secondly, to provide work for such as are able, and cannot otherwise get employment. [360] For these joint purposes they are empowered to make and levy rates upon the several inhabitants of the parish, by the same act of parliament; which has been further explained and enforced by several subsequent statutes. [361] The two great objects of this

8. In this country they are also the ministerial officers of the courts of justices of the peace and in that capacity serve all process issuing from justice courts. Their duties are prescribed by statute.

9. See the local statutes upon this subject.

1. Consult the local statutes upon this subject, as there is no uniform rule in this country.

statute seem to have been, 1, To relieve the impotent poor, and them only. 2, To find employment for such as are able to work; and this principally by providing stocks of raw materials to be worked up at their separate homes, instead of accumulating all the poor in one common workhouse.

This appears to have been the plan of the statute of Queen Elizabeth; in which the only defect was confining the management of the poor to small parochial districts, which are frequently incapable of furnishing proper work or providing an able director. However, the laborious poor were then at liberty to seek employment wherever it was to be had, none being obliged to reside in the places of their settlement but such as were unable or unwilling to work; and those places of settlement being only such where they were *born*, or had made their *abode*, originally for three years, and afterwards (in the case of vagabonds) for one year only. [362]

After the Restoration a very different plan was adopted, which has rendered the employment of the poor more difficult, by authorizing the subdivisions of parishes; has greatly increased their number, by confining them all to their respective districts; has given birth to the intricacy of our poor-laws, by multiplying and rendering more easy the methods of gaining settlements; and, in consequence, has created an infinity of expensive law-suits between contending neighborhoods, concerning those settlements and removals. By the statute 13 and 14 Car. II. c. 12, a legal settlement was declared to be gained by *birth*, or by *inhabitancy*, *apprenticeship*, or *service*, for forty days; within which period all intruders were made removable from any parish by two justices of the peace, unless they settled in a tenement of the annual value of 10*l*. The frauds naturally consequent upon this provision, which gave a settlement by so short a residence, produced the statute 1 Jac. II. c. 17, which directed *notice* in writing to be delivered to the parish officers, before a settlement could be gained by such residence. Subsequent provisions allowed other circumstances of notoriety to be equivalent to such notice given; and those circumstances have from time to time been altered, enlarged, or restrained, whenever the experience of new inconveniences, arising daily from new regulations, suggested the necessity of a remedy. And the doctrine of *certificates* was invented, by way of counterpoise, to restrain a man and his family from acquiring a new settlement by any length of residence whatever, unless in two particular excepted cases, which makes parishes very cautious of giving such certificates, and of course confines the poor at home, where frequently no adequate employment can be had.

The law of settlement may be therefore now reduced to the following general heads; or, a settlement in a parish may be acquired, 1, By *birth*; for wherever a child is first known to be, that is always *prima facie* the place of settlement until some other can be shown. [363] This is also generally the place of settlement of a bastard child, for a bastard,

having in the eye of the law no father cannot be referred to *his* settlement, as other children may. But in legitimate children, though the place of birth be *prima facie* the settlement, yet it is not conclusively so; for there are, 2, Settlements by *parentage*, being the settlement of one's father or mother; all legitimate children being really settled in the parish where their parents are settled until they get a new settlement for themselves. A new settlement may be acquired several ways; as, 3, By *marriage;* for a woman marrying a man that is settled in another parish changes her own settlement, the law not permitting the separation of husband and wife. But if the man has no settlement, hers is suspended during his life if he remains in England and is able to maintain her; but in his absence, or after his death, or during, perhaps, his inability, she may be removed to her old settlement. The other methods of acquiring settlements in any parish are all reducible to this one, of *forty days' residence* therein; but this forty days' residence (which is construed to be lodging or lying there) must not be by fraud, or stealth, or in any clandestine manner, but made notorious by one or other of the following concomitant circumstances. The next method, therefore, of gaining a settlement is, 4, By forty days' residence, and *notice*. For if a stranger comes into a parish and delivers notice in writing of his place of abode, and number of his family, to one of the overseers (which must be read in the church and registered), and resides there unmolested for forty days after such notice, he is legally settled thereby. For the law presumes that such a one at the time of notice is not likely to become chargeable, else he would not venture to give it, or that in such case the parish would take care to remove him. But there are also other circumstances equivalent to such notice; therefore, 5, *Renting* for a year a tenement of the yearly value of 10*l*., and residing forty days in the parish, gains a settlement without notice, upon the principle of having substance enough to gain credit for such a house. [364] 6, Being charged to and paying the public *taxes* and levies of the parish, excepting those for scavengers, highways, and the duties on houses and windows; and, 7, Executing, when legally appointed, any public parochial *office* for a whole year in the parish, as church warden, &c., are both of them equivalent to notice. and gain a settlement if coupled with a residence of forty days. 8, Being *hired* for a year, when unmarried and childless, and *serving* a year in the same service; and 9, Being bound an *apprentice* give the servant and apprentice a settlement, without notice, in that place wherein they serve the last forty days. This is meant to encourage application to trades, and going out to reputable services. 10, Lastly, the having an *estate* of one's own, and residing thereon forty days, however small the value may be, in case it be acquired by act of law, or of a third person, as by descent, gift, devise, &c., is a sufficient settlement; but if a man acquire it by his own act, as by purchase (in its popular sense, in consideration of money paid), then unless the con-

sideration advanced, *bona fide*, be 30*l.*, it is no settlement for any longer time than the person shall inhabit thereon. He is in no case removable from his own property; but he shall not, by any trifling or fraudulent purchase of his own, acquire a permanent and lasting settlement.

All persons not so settled may be removed to their own parishes, on complaint of the overseers, by two justices of the peace, if they shall adjudge them likely to become chargeable to the parish into which they have intruded; unless they are in a way of getting a legal settlement, as by having hired a house of 10*l.* per annum, or living in an annual service, for then they are not removable. [365] And in all other cases, if the parish to which they belong will grant them a certificate, acknowledging them to be *their* parishioners, they cannot be removed merely because *likely* to become chargeable, but only when they become *actually* chargeable. But such certificated person can gain no settlement by any of the means above mentioned, unless by renting a tenement of 10*l. per annum*, or by serving an annual office in the parish, being legally placed therein; neither can an apprentice or servant to such certificated person gain a settlement by such their service.[2]

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2. See 1 Broom & Had. Com. *437; and the statutes of the several states upon this subject.

CHAPTER X.

OF THE PEOPLE, WHETHER ALIENS, DENIZENS, OR NATIVES.

The first and most obvious division of the people is into aliens and natural-born subjects. [366]

Natural-born subjects are such as are born within the dominions of the crown of England, — that is, within the ligeance, or, as it is generally called, the allegiance of the king, — and **aliens** such as are born out of it.[1] **Allegiance** is the tie, or *ligamen*, which binds the subject to the king in return for that protection which the king affords the subject.

Under the feodal system every owner of lands held them in subjection to some superior or lord, from whom or whose ancestors the tenant or vassal had received them, and there was a mutual trust or confidence subsisting between the lord and vassal that the lord should protect the vassal in the enjoyment of the territory he had granted him, and, on the other hand, that the vassal should be faithful to the lord and defend him against all his enemies. [367] This obligation on the part of the vassal was called *fidelitas* or **fealty,** and an oath of fealty was required, by the feodal law, to be taken by all tenants to their landlord, which is couched in almost the same terms as our ancient oath of allegiance, except that in the usual oath of fealty there was frequently a saving or exception of the faith due to a superior lord by name, under whom the landlord himself was perhaps only a tenant or vassal. But when the acknowledgment was made to the absolute superior himself, who was vassal to no man, it was no longer called the oath of fealty, but the **oath of allegiance,** and therein the tenant swore to bear faith to his sovereign lord, in opposition to all men, without any saving or exception: "*contra omnes homines fidelitatem fœcit.*" Land held by this exalted species of fealty was called *feudum ligium*, or liege fee, the vassals *homines ligii*, or liege men, and the sovereign their *dominus ligius*, or liege lord. And when sovereign princes did homage to each other for lands held under their respective sovereignties, a distinction was always made between *simple* homage, which was only an acknowledgment of tenure, and *liege* homage,

1. See Black's Const. Law, 257; Wilson's Int. Law, 126-135. A temporary absence of the parents from the country and the birth of a child abroad during such absence will not make the child an alien, even as it seems, though the mother be an alien. Ludlam v. Ludlam, 26 N. Y. 357.

which included the fealty before mentioned and the services consequent upon it. Thus when our Edward III. in 1329 did homage to Philip VI. of France for his ducal dominions on that continent, it was warmly disputed of what species the homage was to be, whether *liege* or *simple* homage. But with us in England, it becoming a settled principle of tenure that *all* lands in the kingdom are holden of the king as their sovereign and lord paramount, no oath but that of fealty could ever be taken to inferior lords, and the oath of allegiance was necessarily confined to the person of the king alone. By an easy analogy the term of allegiance was soon brought to signify all other engagements which are due from subjects to their prince as well as those duties which were simply and merely territorial. And the oath of allegiance, as administered for upwards of six hundred years, contained a promise "to be true and faithful to the king and his heirs, and truth and faith to bear of life and limb and terrene honor, and not to know or hear of any ill or damage intended him without defending him therefrom." [368] But at the Revolution the terms of this oath being thought perhaps to favor too much the notion of non-resistance, the present form was introduced by the convention parliament, which is more general and indeterminate than the former, the subject only promising "that he will be faithful and bear *true* allegiance to the king," without mentioning "his heirs" or specifying in the least wherein that allegiance consists. The oath of supremacy is principally calculated as a renunciation of the pope's pretended authority, and the oath of abjuration, introduced in the reign of King William, very amply supplies the loose and general texture of the oath of allegiance, it recognizing the right of his Majesty derived under the act of settlement, engaging to support him to the utmost of the juror's power, promising to disclose all traitorous conspiracies against him, and expressly renouncing any claim of the descendants of the late Pretender, in as clear and explicit terms as the English language can furnish. This oath must be taken by all persons in any office, trust, or employment, and may be tendered by two justices of the peace to any person whom they shall suspect of disaffection. And the oath of allegiance may be tendered to all persons above the age of twelve years, whether natives, denizens, or aliens, either in the court-leet of the manor or in the sheriff's tourn, which is the court-leet of the county.[2]

But besides these express engagements the law also holds that there is **an implied, original, and virtual allegiance owing from every subject to his sovereign antecedently to**

2. For the present state of the English law upon this subject, see 1 Broom & Had. Com. 444.

any express promise, and although the subject never swore any faith or allegiance in form. [369] For as the king by the very descent of the crown is fully invested with all the rights and bound to all the duties of sovereignty before his coronation, so the subject is bound to his prince by an intrinsic allegiance before the superinduction of those outward bonds of oath, homage, and fealty which were only instituted to remind the subject of this his previous duty and for the better securing its performance. The formal profession, therefore, or oath of subjection, is nothing more than a declaration in words of what was before implied in law.

Allegiance both express and implied is, however, distinguished by the law into two sorts or species, the one natural, the other local; the former being also perpetual, the latter temporary. **Natural allegiance** is such as is due from all men born within the king's dominions immediately upon their birth. For immediately upon their birth they are under the king's protection, at a time, too, when (during their infancy) they are incapable of protecting themselves. Natural allegiance is therefore a debt of gratitude which cannot be forfeited, cancelled, or altered, or altered by any change of time, place, or circumstance, nor by anything but the united concurrence of the legislature.[3]

3. "In 1870 (33 Vict., c. 14) a new and very important statute gave to the alien all desirable facilities of becoming a British subject, and to the British subject the power of **renouncing his nationality**. By this statute an alien, after five years' residence in the United Kingdom, or service of the crown, who intends, if naturalized, to continue his residence or service, may apply to one of the principal secretaries of state for a certificate of naturalization. When thus naturalized he becomes entitled to all the political rights and powers of a British subject, and is placed under all the obligations of a subject, with this qualification,—that within the limits of the state to which he formerly belonged he shall not be deemed to be a British subject unless he has ceased to be a subject of that state in pursuance of its laws or of a treaty to that effect. It is provided also that aliens naturalized according to the statute of 1844 (7 & 8 Vict., c. 66) may partake of the advantages of this new mode of naturalization. On the other hand, any British subject naturalized in any foreign state is deemed to have ceased to be a subject and is regarded as an alien, and

Local allegiance is such as is due from an alien or stranger-born, for so long time as he continues within the king's dominion and protection, and it ceases the instant such stranger transfers himself from this kingdom to another. [370] Natural allegiance is therefore perpetual, and local, temporary only. The allegiance of an alien is confined in point of time to the duration of his residence [within this realm], and in point of locality to the dominions of the British Empire. From which considerations Sir Matthew Hale deduces this consequence, that though there be an usuper of the crown, yet it is treason for any subject, while the usurper is in full possession of the sovereignty, to practise anything against his crown and dignity; wherefore, although the true prince regain the sovereignty, yet such attempts against the usurper (unless in defence or aid of the rightful king) have been afterwards punished with death, because of the breach of that temporary allegiance which was due to him as king *de facto* [in fact]. [371]

This oath of allegiance, or rather the allegiance itself, is held to be applicable not only to the political capacity of the king or regal office, but to his natural person and blood royal.

An alien born may purchase lands or other estates, but not for his own use, for the king is thereupon entitled to them.[4] [372]

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a British subject who has thus become an alien can be readmitted to British nationality on the same terms with other aliens, but with the qualification before noticed. . . . In August of the same year and in conformity with this statute, a convention relative to naturalization was concluded between Great Britain and the United States. Subjects or citizens of either state may be naturalized in the other according to its laws, and after this they cease to retain their old national *status* [or condition]; but may regain it like other aliens, and the same alternation of nationality may be renewed over and over." Woolsey's Int. Law (5th ed), § 70, p. 100. See, also, Wilson's Int. Law, 135; Black's Const. Law, 257; 15 U. S. Stat. at Large, 223.

4. An alien cannot, however, at common law take real property by descent. This rule and the rule stated in the text have been greatly changed by statutes both here and in England. See the local state statutes; also 33 Vict., c. 14. See, also, U. S. Const., art. 14, amend. sec. 1, by which it is provided that "All per-

Yet an alien may acquire a property in goods, money and other personal estate, or may hire a house for his habitation, for personal estate is of a transitory and movable nature; and besides, this indulgence to strangers is necessary for the advancement of trade. **Aliens also may trade** as freely as other people. **Also an alien may bring an action concerning personal property, and may make a will** and dispose of his personal estate. When I mention these rights of an alien, I must be understood of **alien friends only,** or such whose countries are in peace with ours; for alien enemies have no rights, no privileges, unless by the king's special favor, during the time of war. [373]

When I say that an alien is one who is born out of the king's dominions or allegiance, this also must be understood with some restrictions. **The children of the king's ambassadors born abroad** were always held to be natural subjects; for as the father, though in a foreign country, owes not even a local allegiance to the prince to whom he is sent, so, with regard to the son also, he was held (by a kind of *postliminium*)[5] to be born under the king of England's allegiance, represented by his father the ambassador. To encourage also foreign commerce, it was enacted by statute 25 Edw. III. st. 2, that all children born abroad, provided *both* their parents were at the time of his birth in allegiance to the king, and the mother had passed the seas by her husband's consent, might inherit as if born in England, and accordingly it hath been so adjudged in behalf of merchants. But by several more modern statutes these restrictions are still farther taken off, so that all children, born out of the king's ligeance, whose *fathers* (or *grandfathers* by the father's side) were natural-born subjects,

sons born or naturalized in the United States and subject to the jurisdiction thereof are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." See, also, U. S. Const. Amd. 15.

5. A return to one's old condition and former privileges.

are now deemed to be natural-born subjects themselves to all intents and purposes; unless their said ancestors were attained, or banished beyond the sea for high treason, or were at the birth of such children in the service of a prince at enmity with Great Britain. Yet the grandchildren of such ancestors shall not be privileged in respect of the alien's duty, except they be Protestants, and actually reside within the realm; nor shall be enabled to claim any estate or interest, unless the claim be made within five years after the same shall accrue.[6]

The children of aliens born here in England are, generally speaking, natural-born subjects, and entitled to all the privileges of such.[7] [374]

A denizen is an alien born, but who has obtained, *ex donatione regis*,[8] letters-patent to make him an English subject,—a high and incommunicable branch of the royal prerogative. A denizen is in a kind of middle state, between an alien and natural-born subject, and partakes of both of them. He may take lands by purchase or devise, which an alien may not, but cannot take by inheritance; for his parent, through whom he must claim, being an alien, had no inheritable blood, and therefore could convey none to the son. And, upon a like defect of hereditary blood, the issue of a denizen, born *before* denization, cannot inherit to him, but his issue born *after* may. A denizen is not excused from paying the alien's duty, and some other mercantile burthens. And no denizen can be of the privy council, or either house of parliament, or have any office of trust, civil or military, or be capable of any grant of lands, &c., from the crown.

Naturalization cannot be performed but by act of parliament; for by this an alien is put in exactly the same state as if he had been born in the king's ligeance; except only

6. "The children of persons who now are or have been citizens of the United States shall, though born out of the limits and jurisdiction of the United States, be considered as citizens thereof." Rev. Stat. U. S., § 2172; Wilson's Int. Law, 126-135 and cases cited. As to statutory changes of the law in England since the time of the author, see 1 Broom & Had. Com., *450.

7. Unless, of course, coming within some exception already noticed, such as the children of an ambassador.

8. By gift of the king. We have nothing corresponding to denization in our country.

that he is incapable, as well as a denizen, of being a member of the privy council, or parliament, holding offices, grants, &c. No bill for naturalization can be received in either house of parliament without such disabling clause in it; nor without a clause disabling the person from obtaining any immunity in trade thereby in any foreign country, unless he shall have resided in Britain for seven years next after the commencement of the session in which he is naturalized. Neither can any person be naturalized or restored in blood unless he hath received the sacrament of the Lord's Supper within one month before the bringing in of the bill, and unless he also takes the oath of allegiance and supremacy in the presence of the parliament. But these provisions have been usually dispensed with by special acts of parliament, previous to bills of naturalization of any foreign princes or princesses.[9]

9. The English law of naturalization has been considerably changed since our author wrote. For these changes see 1 Broom & Had. Com., *453; Woolsey's Int. Law, § 70; *ante*, p. 66; Wilson's Int. Law, 126. See Rev. Stat. U. S., § 2165 *et seq.* for the American law upon this subject, also Wilson's Int. Law, 126.

CHAPTER XI.

OF THE CLERGY.

[Inasmuch as it is provided by the Constitution of the United States that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof" (Amend. Art. I.), and that "no religious test shall ever be required as a qualification to any office or public trust under the United States" (Const. Art. VI.), — which principles have been generally adopted by the individual states in their constitutions, — the matters discussed in this chapter are not deemed of sufficient practical value to have a place in this abridgment.]

CHAPTER XII.

OF THE CIVIL STATE.

The lay part of his Majesty's subjects, or such of the people as are not comprehended under the denomination of clergy, may be divided into three distinct states, the civil, the military, and the maritime. [396]

That part of the nation which falls under our first and most comprehensive division, **the civil state,** includes all orders of men, from the highest nobleman to the meanest peasant, that are not included under either our former division, of clergy, or under one of the two latter, the military and maritime states; and it may sometimes include individuals of the other three orders, since a nobleman, a knight, a gentleman, or a peasant may become either a divine, a soldier, or a seaman.

The civil state consists of the nobility and the commonalty. Of the nobility, the peerage of Great Britain, or Lords Temporal, as forming, together with the bishops, one of the supreme branches of the legislature, I have before sufficiently spoken. We are here to consider them according to their several degrees, or titles of honor.

All degrees of nobility and honor are derived from the king as their fountain, and he may institute what new titles he pleases. Hence it is that all degrees of nobility are not of equal antiquity. Those now in use are dukes, marquises, earls, viscounts, and barons.

1. **A duke** [Latin *dux, ducis*, a leader], though he be with us, in respect of his title of nobility, inferior in point of antiquity to many others, yet is superior to all of them in rank; his being the first title of dignity after the royal family. [397]

2. **A marquis,** *marchio*, is the next degree of nobility. His office formerly was (for dignity and duty were never separated by our ancestors) to guard the frontiers and limits of the kingdom, which were called the marches, from the Teutonic word *marche*, a limit.

3. **An earl** is a title of nobility so ancient that its original cannot clearly be traced out. [398] Thus much seems tolerably certain: that among the Saxons they were called *ealdormen, quasi* elder men, signifying the same as *senior* or *senator* among the Romans, and also *schiremen*, because they had each of them the civil government of a several division or shire. On the irruption of the Danes they changed the name to *eorles*, which, according to Camden, signified the same in their language. In Latin they are called *comites* (a title first used in the Empire), from being the king's attendants,—"*a societate nomen sumpserunt, reges enim tales sibi associant.*"[1] After the Norman Conquest they were for some

1. They were named from their society because they were companions of the king.

time called *counts* or *counters*, from the French; but they did not long retain that name themselves, though their shires are from thence called counties to this day. The names of *earls* or *comites* is now become a mere title, they having nothing to do with the government of the county; which, as has been more than once observed, is now entirely devolved on the sheriff, the earl's deputy, or *vice-comes*.

4. The name of **vice-comes or viscount** was afterwards made use of as an arbitrary title of honor, without any shadow of office pertaining to it, by Henry VI., when, in the eighteenth year of his reign, he created John Beaumont a peer, by the name of Viscount Beaumont, which was the first instance of the kind.

5. **A baron's** is the most general and universal title of nobility; for originally every one of the peers of superior rank had also a barony annexed to his other titles. [399] . . . Richard II. first made it a mere title of honor by conferring it on divers persons by his letters-patent.

The right of peerage seems to have been originally territorial, that is, annexed to lands, honors, castles, manors, and the like, the proprietors and possessors of which were, in right of those estates, allowed to be peers of the realm, and were summoned to parliament to do suit and service to their sovereign, and when the land was alienated the dignity passed with it as appendant. [400] But afterwards, when alienations grew to be frequent, the dignity of peerage was confined to the lineage of the party ennobled, and instead of territorial became personal.

Peers are now created either by writ or by patent, for those who claim by prescription must suppose either a writ or patent made to their ancestors, though by length of time it is lost. **The creation by writ,** or the king's letter, is a summons to attend the House of Peers by the style and title of that barony which the king is pleased to confer; **that by patent** is a royal grant to a subject of any dignity and degree of peerage. The creation by writ is the more ancient way, but a man is not ennobled thereby unless he actually take his seat in the House of Lords. **The most usual way is to grant the dignity by patent,** which inures to a man and his heirs according to the limitations thereof, though he never himself makes use of it. Creation by writ has also one advantage over that by patent, for a person created by writ holds the dignity to him *and his heirs* without any words to that purport in the writ; but in letters-patent there must be words to direct the inheritance, else the dignity inures only to the grantee for life. [401]

Let us next take a view of a few of the **principal incidents attending the nobility,** exclusive of their capacity as members of parliament and as hereditary counselors of the crown, both of which we have before considered. And first we must observe that in criminal cases a nobleman shall **be tried by his peers.** It is said that this does not extend to bishops, who, though they are lords of parliament and sit there by

virtue of their baronies, which they hold *jure ecclesiae*, yet are not ennobled in blood, and consequently not peers with the nobility. As to peeresses, the statute 20 Hen. VI. c. 9 declares the law to be, that peeresses, either in their own right or by marriage, shall be tried before the same judicature as other peers of the realm. If a woman, noble in her own right, marries a commoner, she still remains noble, and shall be tried by her peers; but if she be only noble by marriage, then by a second marriage with a commoner she loses her dignity, for as by marriage it is gained, by marriage it is also lost. Yet if a duchess dowager marries a baron she continues a duchess still, for all the nobility are *pares*, and therefore it is no degradation. [402] A peer or peeress, either in her own right or by marriage, **cannot be arrested in civil cases,** and they have also many peculiar **privileges annexed to their peerage in the course of judicial proceedings.** A peer sitting in judgment gives not his verdict upon oath like an ordinary juryman, but upon his honor. He answers also to bills in chancery upon his honor and not upon his oath; but when he is examined as a witness either in civil or criminal cases he must be sworn.

A peer cannot lose his nobility but by death or attainder. It hath been said indeed that if a baron wastes his estate so that he is not able to support the degree, the *king* may degrade him; but it is expressly held by later authorities that a peer cannot be degraded but by act of *parliament*.

The commonalty, like the nobility, **are divided into several degrees,** and as the lords, though different in rank, yet all of them are peers in respect of their nobility, so the commoners, though some are greatly superior to others, yet all are in law peers in respect of their want of nobility. [403]

Now the first personal dignity after the nobility is a **knight of the order of St. George, or of the Garter, first instituted** by Edward III. A. D. 1344. Next (but not till after certain *official* dignities, as Privy Counselors, the Chancellors of the Exchequer and Duchy of Lancaster, the Chief Justice of the King's Bench, the Master of the Rolls, and the other English judges) follows a **knight banneret,** who indeed by statutes 5 Ric. II. st. 2, c. 4, and 14 Ric. II. c. 11, is ranked next after barons and his precedence before the younger sons of viscounts was confirmed to him by order of King James I. in the tenth year of his reign. But in order to entitle himself to this rank he must have been created by the king in person, in the field, under the royal banners, in time of open war. Else he ranks after **baronets,** who are the next order, which title is a dignity of inheritance created by letters-patent and usually descendible to the issue male. Next follow **knights of the bath,** an order instituted by King Henry IV. and revived by King George I. [404] They are so called from the ceremony of bathing the night before their creation. The last of these inferior nobility are **knights bachelors,** the most ancient, though the lowest, order of knighthood amongst us.

These, Sir Edward Coke says, are all the names of *dignity* in this kingdom, esquires and gentlemen being only names of *worship*. But before these last the heralds rank all colonels, serjeants at law, and doctors in the three learned professions. [405]

Esquires and gentlemen are confounded together by Sir Edward Coke, who observes that every esquire is a gentleman, and a gentleman is defined to be one *qui arma gerit*, who bears coat armor, the grant of which adds gentility to a man's family. [406] It is indeed a matter somewhat unsettled what constitutes the distinction, or who is a real *esquire*, for it is not an estate, however large, that confers this rank upon its owner. Camden, who was himself a herald, distinguishes them the most accurately, and he reckons up four sorts of them: 1. The eldest sons of knights, and their eldest sons, in perpetual succession; 2. The eldest sons of younger sons of peers, and their eldest sons in like perpetual succession, both which species of esquires Sir Henry Spelman entitles *armigeri natalitii*;[2] 3. Esquires created by the king's letters-patent or other investiture, and their eldest sons; 4. Esquires by virtue of their offices, as justices of the peace and others who bear any office of trust under the crown. To these may be added the esquires of knights of the bath, each of whom constitutes three at his installation; and all foreign, nay Irish peers, for not only these, but the eldest sons of peers of Great Britain, though frequently titular lords, are only esquires in the law, and must be so named in all legal proceedings. As for **gentlemen,** says Sir Thomas Smith, they be made good cheap in this kingdom, for whosoever studieth the laws of the realm, who studieth in the universities, who professeth the liberal sciences, and, to be short, who can live idly and without manual labor, and will bear the port, charge, and countenance of a gentleman, he shall be called master and shall be taken for a gentleman. **A yeoman** is he that hath free land of forty shillings by the year, who was anciently thereby qualified to serve on juries, vote for knights of the shire, and do any other act where the law requires one that is *probus et legalis homo*.[3] [407]

The rest of the commonalty are tradesmen, artificers, and laborers, who, as well as all others, must, in pursuance of the statute 1 Hen. V. c. 5, be styled by the name and addition of their estate, degree, or mystery, and the place to which they belong, or where they have been conversant, in all original writs of actions personal, appeals, and indictments, upon which process of outlawry may be awarded, in order, as it should seem, to prevent any clandestine or mistaken outlawry, by reducing to a specific certainty the person who is the object of its process.

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2. Armbearers by birth.

3. Good and lawful man.

CHAPTER XIII.

OF THE MILITARY AND MARITIME STATES.

The military state includes the whole of the soldiery, or such persons as are peculiarly appointed among the rest of the people for the safeguard and defence of the realm. [408] **[The subject-matter of this chapter has no application in the United States.]**

CHAPTER XIV.

OF MASTER AND SERVANT.[1]

The three great relations in private life are, 1. That of master and servant, which is founded in convenience, whereby a man is directed to call in the assistance of others where his own skill and labor will not be sufficient to answer the cares incumbent upon him. [422] 2. **That of husband and wife,** which is founded in nature but modified by civil society, — the one directing man to continue and multiply his

1. In the older books the entire law of agency was comprised and discussed under the head "Master and Servant." The author's discussion of this topic is so brief, that a summary of the modern law of agency, though necessarily very brief, will be given here, references for details being made principally to the recent work of Mr. Tiffany upon the subject.

An agent may be defined as a person authorized by another, called the principal, either by prior authority duly conferred, or by subsequent ratification, to do any legal act in his, the principal's, behalf. Tiffany, Agency, 1-3, where a collection of definitions will be found in the notes. A servant is included within this definition, the only difference being in the nature of the services. Id., p. 5.

The relation may be created by appointment, by ratification of acts done as an agent, or by estoppel; and the authority may be conferred, unless otherwise prescribed by statute, by parol. However, authority to execute a deed must be conferred by a sealed instrument. Tiffany, Agency, 15, 20, and cases cited. In some peculiar cases an agency may be inferred by necessity from the relations of the parties. Tiffany, Agency, 39, and cases cited, where the subject is discussed in detail.

As a rule any person capable of contracting may act by an agent. An infant, insane person or a married woman cannot act by an agent, though as to infants and insane persons the tendency is to limit the exception to authority conferred by a sealed instrument. See Tiffany, Agency, 94; Ewell's Lead. Cases (1st Ed.), 44, note and cases cited.

Any person, even one under a disability, may be an agent to such an extent as to bind the principal. If one sets a vicious dog upon another to his damage, though the dog can hardly be called an agent, the one so setting him on would be clearly liable for the injury.

The relation of agency once created, may be terminated by limitation contained in the terms of the appointment, by the act of the parties or by operation of law, as by the death of either principal or agent, the insanity of the principal, the

species, the other prescribing the manner in which that natural impulse must be confined and regulated. 3. **That of parent and child,** which is consequential to that of marriage, being its principal end and design, and it is by virtue of this relation that infants are protected, maintained, and educated. 4. **That of guardian and ward,** which is a kind of artificial parentage in order to supply the deficiency, whenever it happens, of the natural.

I. **As to the several sorts of servants,** I have formerly observed that pure and proper **slavery does not** — nay, cannot — **subsist in England,** — such, I mean, whereby an ab-

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marriage of a *feme sole* principal, the bankruptcy of the principal, or by war where the principal and agent are citizens of different and belligerent countries. Tiffany, Agency, ch. 6, and cases cited. Where, however, the authority constitutes a security or is coupled with an interest in the agent, the death of the principal does not revoke the authority.

As to the liability of the principal for the acts of his agent, he is liable to third persons for every act done by his agent, within the real or apparent scope of his authority. This is the broadest and most important rule in this branch of the law. The principal is not, however, as a rule criminally liable for the act of his agent, unless he has previously actually authorized the criminal act. See Tiffany, Agency, 269, 297; Ewell's Evans Agency, *453.

"A party to a contract made by an agent in the name of his principal, is liable thereon to the principal, who alone may sue thereon." And in such action the fraud, misrepresentation, etc., of the agent within the real or apparent scope of his authority will constitute a defence in the same manner as if the act of the agent had been committed by his principal. Tiffany, Agency, ch. 12, where the cases are fully collected.

"Where a third person by his wrongful act inflicted upon a servant deprives the master of his services, or knowingly entices from the service of the master a servant employed under a contract, such person is liable to the master for the loss of service thereby caused." Tiffany, Agency, 328, and cases cited. See the leading case of Lumley v. Gye, 2 Ell. & B. 216; Cooley on Torts, *279; Hale on Torts, 362.

A duly authorized contract made by an agent in the name of his principal imposes no liability upon the agent. The principal alone is liable. But where the agent contracts personally or without authority he is liable upon his contract. See Tiffany, Agency, 330, 355, 368. See exceptions to rule stated on page 355.

It is the duty of the agent to his principal to obey legal instructions, to exercise skill, care, diligence and good faith and to account to his principal; and when he has so performed the stipulated services he is entitled to compensation therefor, unless the

solute and unlimited power is given to the master over the life and fortune of the slave. [423] And now it is laid down that a slave or negro, the instant he lands in England, becomes a freeman, — that is, the law will protect him in the enjoyment of his person and his property. [424] Yet with regard to any right which the master may have lawfully acquired to the perpertual service of John or Thomas, this will remain exactly in the same state as before; for this is no more than the same state of subjection for life which every apprentice submits to for the space of seven years, or sometimes for a longer term.[2] [425]

1. The first sort of servants, therefore, acknowledged by the laws of England are **menial servants,** so called from being *intra maenia*, [within the walls] or domestics. The contract between them and their masters arises upon the hiring. If the hiring be general, without any particular time limited, the law construes it to be a hiring for a year [not the rule in the United States], but the contract may be made for any larger or smaller term. All single men between twelve years old and sixty, and married ones under thirty years of age, and all single women between twelve and forty, not having any visible livelihood, are compellable by two justices to go out to service in husbandry, or certain specific trades, for the promotion of honest industry [not law in the United States]; and no master can put away his servant, or servant leave his master after being so retained, either before or at the end of his term, without a quarter's warning, unless upon reasonable cause,

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contract otherwise stipulates, even though no benefit accrues to his principal. Tiffany, Agency, 395-438, 439, 445, and cases cited.

The foregoing are the principal rules of the law of agency, though stated very briefly. For details, see the works cited.

2. "The meaning of this sentence is not very intelligible. If a right to perpetual service can be acquired lawfully at all, it must be acquired by a contract with one who is free, who is *sui juris* [of his own right] and competent to contract. Such a hiring may not perhaps be illegal and void. If a man can contract to serve for one year, there seems to be no reason to prevent his contracting to serve for one hundred years, if he should so long live, though in general the courts would be inclined to consider it an improvident engagement, and would not be very strict in enforcing it. But there could be no doubt but such a contract with a person in a state of slavery would be absolutely null and void."— *Christian.* It was decided in 1772, on *habeas corpus* in the case of James Somersett, that a heathen negro when brought to England owes no service to an American or any other master. 20 State Trials, 1; Lofft's Rep., 1.

to be allowed by a justice of the peace.[3] But they may part by consent, or make a special bargain. [426]

2. Another species of servants are called **apprentices** (from *apprendre,* to learn), and are usually bound for a term of years by deed indented, or indentures, to serve their masters and be maintained and instructed by them. This is usually done to persons of trade, in order to learn their art and mystery, and sometimes very large sums are given with them as a premium for such their instruction; but it may be done to husbandmen — nay, to gentlemen — and others. And children of poor persons may be apprenticed out by the overseers, with consent of two justices, till twenty-one years of age, to such persons as are thought fitting, for which purposes our statutes have made the indentures obligatory, even though such parish apprentice be a minor.[4]

3. A third species of servants are **laborers,** who are only hired by the day or the week, and do not live *intra maenia* [within the walls] as part of the family, concerning whom the statutes before cited have made many very good regulations: 1, Directing that all persons who have no visible effects may be compelled to work; [427] 2, Defining how long they must continue at work in summer and in winter; 3, Punishing such as leave or desert their work; 4, Empowering the justices at sessions, or the sheriff of the county, to settle their wages; and 5, Inflicting penalties on such as either give or exact more wages than are so settled.[5]

4. There is yet a fourth species of servants, if they may be so called, being rather in a superior, a ministerial, capacity, such as **stewards, factors, and bailiffs,** whom, however, the law considers as servants *pro tempore,* with regard to such of their acts as affect their master's or employer's property. Which leads me to consider, —

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3. Here, if discharged without cause, the servant may, if ready and willing to serve, collect wages for the whole period contracted for. Justices of the peace have no such jurisdiction in the United States.

4. Variously regulated by statute in this country. Consult the local statutes.

5. The distinction between menial servants and laborers does not prevail in the United States. See, however, state statutes upon the subject of vagrancy.

II. **The manner in which their relation of service affects either the master or servant.**

And, first, by hiring and service for a year, or apprenticeship under indentures, a person gains a settlement in that parish wherein he last served forty days. In the next place, persons serving seven years as apprentices to any trade have an exclusive right to exercise that trade in any part of England. [Repealed.]

A master may by law correct his apprentice for negligence or other misbehavior, so it be done with moderation,[6] though, if the master or master's wife beats any other servant of full age, it is good cause of departure. [428]

By service all servants and laborers, except apprentices, become entitled to **wages**: according to their agreement, if menial servants. [And in the United States in all other cases of service also, where the relation is created by contract, either according to the terms of the agreement or upon a *quantum meruit*.[7]

III. Let us, lastly, see **how strangers may be affected by this relation of master and servant**; or how a master may behave towards others on behalf of his servant; and what a servant may do on behalf of his master. [429]

And first, **the master may maintain, that is, abet and assist, his servant** in any action at law against a stranger; whereas in general it is an offence against public justice to encourage suits and animosities by helping to bear the expense of them, and is called in law maintenance. **A master also may bring an action against any man for beating or maiming his servant**; but in such case he must assign, as a special reason for so doing, his own **damage by the loss of his service**, and this loss must be proved upon the trial. A master likewise may **justify an assault** in defence of his servant, and a servant in defence of his master, — the master, because he has an interest in his servant, not to be de-

6. The text is clearly sustained by the early authorities. See Reeve's Dom. Rel., *374, and cases cited. The better opinion now is that this right cannot be extended beyond apprentices and menial servants under age. 2 Kent Com., 261; Reeve's Dom. Rel., *375.

7. See this term explained *post*, under the head Pleading.

prived of his service; the servant, because it is part of his duty, for which he receives his wages, to stand by and defend his master. **Also if any person do hire or retain my servant,** being in my service, for which the servant departeth from me and goeth to serve the other, I may have an action for damages against both the new master and the servant, or either of them. But if the new master did not know that he is my servant, no action lies, unless he afterwards refuse to restore him upon information and demand.

As for those things which a servant may do on behalf of his master, they seem all to proceed upon this principle: that **the master is answerable for the act of his servant if done by his command, either expressly given or implied;** *nam qui facit per alium, facit per se.*[8] Therefore, if the servant commit a trespass by the command or encouragement of his master, the master shall be guilty of it, though the servant is not thereby excused, for he is only to obey his master in matters that are honest and lawful. [430] If an innkeeper's servants rob his guests, the master is bound to restitution; for as there is a confidence reposed in him that he will take care to provide honest servants, his negligence is a kind of implied consent to the robbery; *nam qui non prohibet, cum prohibere possit, jubet.*[9] So likewise if the drawer at a tavern sells a man bad wine, whereby his health is injured, he may bring an action against the master; for although the master did not expressly order the servant to sell it to that person in particular, yet his permitting him to draw and sell it at all is impliedly a general command.

In the same manner, whatever a servant is permitted to do in the usual course of his business, is equivalent to a general command. If I pay money to a banker's servant, the banker is answerable for it; if I pay it to a clergyman's or a physician's servant, whose usual business it is not to receive money for his master, and he embezzles it, I must

8. For who does a thing by another, does it himself.

9. For he who does not prohibit when he has power to do so, commands.

pay it over again. If a steward lets a lease of a farm without the owner's knowledge, the owner must stand to the bargain, for this is the steward's business. A wife, a friend, a relation that use to transact business for a man, are *quoad hoc* his servants, and the principal must answer for their conduct; for the law implies that they act under a general command. And without such a doctrine as this no mutual intercourse between man and man could subsist with any tolerable convenience. If I usually deal with a tradesman by myself, or constantly pay him ready money, I am not answerable for what my servant takes up upon trust; for here is no implied order to the tradesman to trust my servant. But if I usually send him upon trust, or sometimes on trust and sometimes with ready money, I am answerable for all he takes up; for the tradesman cannot possibly distinguish when he comes by my order, and when upon his own authority.

If a servant, lastly, by his negligence does any damage to a stranger, the master shall answer for his neglect. If a smith's servant lames a horse while he is shoeing him, an action lies against the master, and not against the servant. [431] But in these cases the damage must be done while he is actually employed in the master's service, otherwise the servant shall answer for his own misbehavior. Upon this principle, by the common law, if a servant kept his master's fire negligently, so that his neighbor's house was burned down thereby, an action lay against the master, because this negligence happened in his service; otherwise, if the servant, going along the street with a torch, by negligence sets fire to a house, for there he is not in his master's immediate service, and must himself answer the damage personally. But now the common law is, in the former case, altered by statute, 6 Anne c. 3 [re-enacted with some extensions of place by 14 Geo. III. c. 78, § 86], which ordains that no action shall be maintained against any in whose house or chamber any fire shall accidentally begin; for their own loss is sufficient punishment for their own or their servant's carelessness. [*Held,* that the word "accident-

ally " does not apply to fires caused by the negligence of either the owner or any of his servants. Filliter *v.* Phippard, 11 Q. B. 347.] A master is, lastly, chargeable if any of his family layeth or casteth anything out of his house into the street or common highway, to the damage of any individual, or the common nuisance of his Majesty's liege people; for the master hath the superintendence and charge of all his household.

We may observe that in all the cases here put the master may be frequently a loser by the trust reposed in his servant, but never can be a gainer; he may frequently be answerable for his servant's misbehavior, but never can shelter himself from punishment by laying the blame on his agent. [432] The reason of this is still uniform and the same: that the wrong done by the servant is looked upon in law as the wrong of the master himself; and it is a standing maxim, that **no man shall be allowed to make any advantage of his own wrong.**[1]

1. See Broom's Legal Maxims, *255-270; Co. Litt., 1486. The student is advised to study diligently the maxims and their explanation in the volume first above cited. It is a very valuable work.

CHAPTER XV.

OF HUSBAND AND WIFE.

1. **Our law considers marriage in no other light than as a civil contract.** [433] [It constitutes a status, or domestic relation arising out of contract.] The *holiness* of the matrimonial state is left entirely to the ecclesiastical law; the temporal courts not having jurisdiction to consider unlawful marriage as a sin, but merely as a civil inconvenience. The punishment, therefore, or annulling of incestuous or other unscriptural marriages is the province of the spiritual courts [here, usually of courts of chancery], which act *pro salute animae*.[1] And, taking it in this civil light, the law treats it as it does all other contracts,[2] allowing it to be good and valid in all cases where the parties at the time of making it were, in the first place, *willing* to contract; secondly, *able* to contract; and, lastly, actually *did* contract, in the proper forms and solemnities required by law.

First, **they must be willing to contract.** [434] "*Consensus, non concubitus, facit nuptias*," is the maxim of the civil law in this case; and it is adopted by the common lawyers, who indeed have borrowed, especially in ancient times, almost all their notions of the legitimacy of marriage from the canon and civil laws.

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1. For the safety of the soul.

2. It differs from an ordinary contract in that it is indissoluble at the will of the parties. Incurable insanity arising subsequent to the marriage will not avoid it. In its inception, however, it arises from contract and the early common law required no ecclesiastical sanction to render it valid. If it be made *per verba de praesenti* (by words of the present time) and is not followed by cohabitation, or *per verba de futuro* (by words of the future) and is followed by consummation, it amounts in the United States generally to a marriage which the parties cannot dissolve, if they are competent as to age and consent. 2 Kent. Com., 89; Reeve, Dom. Rel., ch. 15, p. *195, and notes; Tiffany, Dom. Rel., 7-37. See, however, Beamish v. Beamish, 9 H. L. Cas. 274; Queen v. Willis, 10 Cl. & F. 534; Beverlin v. Beverlin, 29 W. Va. 732; Commonwealth v. Munson, 127 Mass. 459; Duncan v. Duncan, 10 Ohio St. 181; Cheney v. Arnold, 15 N. Y. 345.

Secondly, **they must be able to contract.** In general, all persons are able to contract themselves in marriage, unless they labor under some particular disabilities and incapacities. What those are, it will be here our business to inquire.

Now these disabilities are of two sorts: first, such as are canonical, and therefore sufficient by the ecclesiastical laws to avoid the marriage in the spiritual court. But these in our law only make the marriage voidable, and not *ipso facto* void, until sentence of nullity be obtained. Of this nature are **precontract,** [abolished] **consanguinity,** or relation by blood **and affinity,** or relation by marriage,[3] and some particular corporal infirmities. But such marriages not being void *ab initio,* but voidable only by sentence of separation, they are esteemed valid to all civil purposes unless such separation is actually made during the life of the parties. [Here, whether a marriage is void or voidable, depends upon the words of the statute.] For, after the death of either of them, the courts of common law will not suffer the spiritual courts to declare such marriages to have been void; because such declaration cannot now tend to the reformation of the parties. It is declared by the statute 32 Hen. VIII. c. 38, that nothing, God's law except, shall impeach any marriage, but within the Levitical degrees, the farthest of which is that between uncle and niece. [435]

The other sorts of disabilities are those which are created, or at least enforced, by the municipal laws. **These civil disabilities make the contract void ab initio,[4] and not merely voidable.** Not that they dissolve a contract already formed, but they render the parties incapable of forming any contract at all; they do not put asunder those who are joined together, but they previously hinder the junction. [436]

3. These disabilities, consanguinity and affinity, are now very generally defined and regulated by statute. In the absence of statute there can be no valid marriage within the Levitical degrees, i. e., within the third degree reckoned according to the civil law, inclusive, that is nearer than first cousins. Tiffany, Dom. Rel. 24, and cases cited. See the local statutes.

4. From the beginning.

1. **The first of these legal disabilities is a prior marriage,** or having another husband or wife living: in which case, besides the penalties consequent upon it as a felony, the second marriage is to all intents and purposes void.[5]

2. **The next legal disability is want of age.** If a boy under fourteen or a girl under twelve years of age marries, this marriage is only inchoate and imperfect; and when either of them comes to the age of consent aforesaid, they may disagree and declare the marriage void, without any divorce or sentence in the spiritual court. And in our law it is so far a marriage, that if at the age of consent they agree to continue together, they need not be married again. If the husband be of years of discretion and the wife under twelve, when she comes to years of discretion he may disagree as well as she may, for in contracts the obligation must be mutual; both must be bound, or neither. And so it is, *vice versa,* when the wife is of years of discretion and the husband under.[6]

3. **Another incapacity arises from want of consent of parents or guardians.** [437] **By the common law, if the parties themselves were of the age of consent, there wanted no other concurrence to make the marriage valid;** and this was agreeable to the canon law. But by several statutes penalties of 100*l.* are laid on every clergyman who marries a couple either without publication of banns, which may give notice to parents or guardians, or without a license, to obtain which the consent of parents or guardians must be sworn to.[7]

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5. This is universally the law in this country.

6. The age of consent has been changed by statute in some states. In Illinois it is 17 for males and 14 for females. In New York the ages are respectively 18 and 16; in Michigan 18 and 16. Consult the local statutes. See R. S. Ill., ch. 89.

While a contract of marriage by an infant above the age of consent is valid, a contract to marry in the future is voidable, although the adult is bound. Holt v. Ward Clarencieux, 2 Strange, 937; s. c., id. 850; 1 Barnard K. B. 247, 277, 333; 2 id. 12, 173, 176; Ewell's Lead. Cases (1st Ed.), 50, where the cases are quite fully collected.

7. A marriage solemnized without such consent is not with us made void, neither is it now void in England. See local statutes.

4. **A fourth incapacity is want of reason,** without a competent share of which, as no other, so neither can the matrimonial contract be valid. It was formerly adjudged that the issue of an idiot was legitimate, and consequently that his marriage was valid. The civil law judged much more sensibly when it made such deprivations of reason a previous impediment, though not a cause of divorce if they happened after marriage. [439] And modern resolutions have adhered to the reason of the civil law, by determining that the marriage of a lunatic, not being in a lucid interval, was absolutely void.[8]

Lastly, **the parties must not only be willing and able to contract, but actually must contract themselves in due form of law,** to make it a good civil marriage. **Any contract made per verba de presenti,** or in words of the present tense, and in case of cohabitation *per verba de futuro*[9] also, between persons able to contract, was before the late act deemed a valid marriage to many purposes, and the parties might be compelled in the spiritual courts to celebrate it *in facie ecclesiae.*[9a] But these verbal contracts are [by statute] now of no force to compel a future marriage. Neither is any marriage at present valid that is not celebrated in some parish church or public chapel, unless by dispensation from the Archbishop of Canterbury. It must also be preceded by publication of banns or by license from the spiritual judge. Many other formalities are likewise prescribed by the act, the neglect of which, though penal, does not invalidate the marriage. It is held to be also essential to a marriage that it be performed by a person in orders, though the intervention of a priest to solemnize this contract is merely *juris positivi*[1] and not *juris naturalis aut divini;* it being said that Pope Innocent III. was the first who ordained the celebration of marriage in the church, before which it was totally a civil contract. [440] And in

8. Middleborough v. Rochester, 12 Mass. 363; Wightman v. Wightman, 4 John. Ch. 343; Ewell's Lead. Cas. (1st Ed.), 600-610, and notes.

9. In words of the future.

9a. In face of the church.

1. Of positive laws, and not of natural or divine law.

the times of the grand rebellion all marriages were performed by the justices of the peace, and these marriages were declared valid, without any fresh solemnization, by stat. 12 Car. II. c. 33. But as the law now stands we may upon the whole collect that no marriage by the temporal law is *ipso facto*[2] *void* that is celebrated by a person in orders, in a parish church or public chapel, or elsewhere by special dispensation, in pursuance of banns or a license, between single persons, consenting, of sound mind, and of the age of twenty-one years, or of the age of fourteen in males and twelve in females, with consent of parents or guardians, or without it in case of widowhood. And no marriage is *voidable* by the ecclesiastical law after the death of either of the parties, nor during their lives, unless for the canonical impediments of precontract, — if that indeed still exists, — of consanguinity, and of affinity, or corporal imbecility, subsisting previous to their marriage.[3]

II. **I am next to consider the manner in which marriages may be dissolved, and this is either by death or divorce.** There are two kinds of divorce, the one total, the other partial; the one *a vinculo matrimonii*, the other merely *a mensa et thoro*. **The total divorce, a vinculo matrimonii,**[4] must be for some of the canonical causes of impediment before mentioned, and those existing *before* the marriage, as is always the case in consanguinity; not supervenient, or arising *afterwards*, as may be the case in affinity or corporal imbecility. For in cases of total divorce, the marriage is declared null, as having been absolutely unlawful *ab initio*,[5] and the parties are therefore separated *pro salute animarum*,[6] — for which reason, as was before observed, no divorce can be obtained but during the life of the parties.

2. In fact.

3. "The doctrine that the intervention of a person in holy orders is essential to marriage has found small support in this country." 1 Bish. Mar. & Div., § 279. "Marriage by mere consent is good throughout the United States, except in some states where local statutes have provided otherwise." Id.

4. From the bonds of matrimony.

5. From the beginning.

6. For the safety of their souls.

The issue of such marriage as is thus entirely dissolved are bastards.[7]

Divorce a mensa et thoro is when the marriage is just and lawful *ab initio,* and therefore the law is tender of dissolving it; but, from some supervenient cause, it becomes improper or impossible for the parties to live together, as in the case of intolerable ill-temper or adultery in either of the parties.[8] [441] With us in England adultery is only a cause of separation from bed and board [but now ground for divorce *a vinculo,* 20 & 21 Vict. c. 85, § 27]. However, divorces *a vinculo matrimonii* for adultery have of late years been frequently granted by act of parliament.[9]

In case of divorce *a mensa et thoro* the law allows **alimony** to the wife, which is that allowance which is made to a woman for her support out of the husband's estate, being settled at the discretion of the ecclesiastical judge on consideration of all the circumstances of the case.[1] It is generally proportioned to the rank and quality of the parties. [442] But in case of elopement and living with an adulterer the law allows her no alimony.

III. Lastly, **the legal consequences of marriage or divorce.**

By marriage, the husband and wife are one person in law; that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated

7. In the United States divorces *a vinculo* are granted for causes arising after marriage, e. g., for adultery, desertion, etc., and in such case the issue are not bastardized. What the author calls a divorce *a vinculo,* corresponds to a decree of nullity with us. See Wightman v. Wightman, 4 John. Ch. 343; Ewell's Lead. Cases (1st Ed.), 602.

8. A divorce *a mensa et thoro* (from bed and board) may be had in the United States and is merely a judicial separation, the marriage bond not being annulled. Causes for divorce are prescribed by statute and vary in the different states. In South Carolina divorce is not granted. Consult the local statutes.

9. Generally prohibited by constitution in this country.

1. Allowed almost of course before decree in all cases of bills for divorce as temporary alimony for counsel fees, support, etc., pending the litigation; and after decree as permanent alimony for the support of the wife and children if the equity of the case warrants it.

and consolidated into that of the husband, under whose wing, protection, and *cover* she performs everything, and is therefore called in our law-French a *feme-covert, foemina viro co-operta,* is said to be *covert-baron,* or under the protection and influence of her husband, her *baron,* or lord, and her condition during her marriage is called her *coverture.* Upon this principle, of an union of person in husband and wife, depend almost all the legal rights, duties, and disabilities that either of them acquire by the marriage. I speak not at present of the rights of property, but of such as are merely *personal.* For this reason a man cannot grant anything to his wife or enter into covenant with her, for the grant would be to suppose her separate existence, and to covenant with her would be only to covenant with himself; and therefore it is also generally true that all compacts made between husband and wife when single are voided by the intermarriage.[2] A woman, indeed, may be attorney for her husband, for that implies no separation from, but is rather a representation of, her lord. And a husband may also bequeath anything to his wife by will, for that cannot take effect till the coverture is determined by his death. **The husband is bound to provide his wife with necessaries** by law as much as himself, and if she contracts debts for them he is obliged to pay them;[3] but for anything besides necessaries he is not chargeable. Also, if a wife elopes and lives with another man, the husband is not chargeable even for necessaries, at least if the person who furnishes them is sufficiently apprised of her elopement. [443] **If the wife**

2. See a collection of leading cases with notes upon the common law disabilities of coverture in Ewell's Lead. Cas. (1st Ed.), 245-521.

In most of the United States these disabilities have to a large but varying extent been removed by statute. Consult the local statutes, remembering that unless an entirely new system has been introduced, statutes in derogation of common law should be strictly construed.

3. The husband is still *prima facie* liable for necessaries during cohabitation on the ground of implied authority as his agent. When the husband supports his wife, she has no power to pledge his credit even for necessaries, unless in fact authorized. If he fails to support her, she may bind him for necessaries whether authorized or not. Tiffany, Dom. Rel. (2d Ed.), 126, 127.

be indebted before marriage the husband is bound afterwards to pay the debt, for he has adopted her and her circumstances together.[4] If the wife be injured in her person or her property she can bring no action for redress without her husband's concurrence, and in his name as well as her own; neither can she be sued without making the husband a defendant.[5] There is indeed one case where the wife shall sue and be sued as a feme sole, viz., where the husband has abjured the realm or is banished, for then he is dead in law, and the husband being thus disabled to sue for or defend the wife, it would be most unreasonable if she had no remedy, or could make no defence at all. In criminal prosecutions, it is true, the wife may be indicted and punished separately, for the union is only a civil union.[6] But in trials of any sort they are not allowed to be evidence for or against each other,[7] partly because it is impossible their testimony should be indifferent, but principally because of the union of person, and therefore, if they were admitted to be witnesses *for* each other, they would contradict one maxim of law, "*nemo in propria causa testis esse debet*,"[8] and, if *against* each other, they would contradict another maxim, "*nemo tenetur seipsum accusare*."[9] But where the offence is directly against the person of the wife, this rule has been usually dispensed with.

But though our law in general considers man and wife as one person, yet there are some instances in which she is separately considered, as inferior to him, and acting by his compulsion. [444] And therefore all deeds executed and acts done by her during her coverture are void, except it be

4. This rule has been generally abolished by statute in this country.

5. In many states she may sue and be sued as a *feme sole*. See local statutes.

6. See 4 Black. Com. 22, 28, *post;* McClain's Cr. L. §§ 145, 147; 1 Bish. Cr. L. (7th Ed.) §§ 357, 362, as to the presumption of coercion arising from the husband's presence.

7. In some of the states the common law rule prevails, in others it has been changed by statute so as to allow husband and wife to testify for but not against each other. Consult the local statutes.

8. No one ought to be a witness in his own cause.

9. No one is bound to accuse himself.

a fine, or the like matter of record, in which case she must be solely and secretly examined, to learn if her act be voluntary. She cannot by will devise lands to her husband, unless under special circumstances, for at the time of making it she is supposed to be under his coercion.[1] And in some felonies and other inferior crimes, committed by her through constraint of her husband [and in his presence], the law excuses her; but this extends not to treason or murder.[2]

The husband, also, by the old law, might give his wife moderate correction.[3] For, as he is to answer for her misbehavior, the law thought it reasonable to intrust him with this power of restraining her by domestic chastisement, in the same moderation that a man is allowed to correct his apprentices or children, for whom the master or parent is also liable in some cases to answer. But this power of correction was confined within reasonable bounds, and the husband was prohibited from using any violence to his wife, *aliter quam ad virum, ex causa regiminis et castigationis, uxoris suae, licite et rationabiliter pertinet.*[4] A wife may now have security of the peace against her husband, or, in return, a husband against his wife. [445] Yet the lower rank of people, who were always fond of the old common law, still claim and exert their ancient privilege, and the courts of law will still permit a husband to restrain a wife of her liberty in case of any gross misbehavior.

1. See as to the common law rules, Ewell's Lead. Cases (1st Ed.), 245-521, and notes. These disabilities have, as before stated, been more or less completely removed by statute in this country. Consult the local statutes.

2. Bishop and Wharton do not except murder and treason. 1 Bish. Cr. L. (7th Ed.), § 358; 1 Whart. Cr. L. (8th Ed.), § 78. She is *prima facie* under his constraint, but this may be rebutted. See note, *supra*.

3. Not now the law in the United States. See Washburn's Manual of Cr. L., 28; McClain's Cr. L., § 243; Harris v. State, 71 Miss. 462; State v. Oliver, 70 N. C. 60; Com. v. McAffee, 108 Mass. 458. See, however, *contra*, State v. Black, 1 Winst. 266; State v. Rhodes, Phill. 453; State v. Mabrey, 64 N. C. 592; State v. Edens, 95 N. C. 693; Bradley v. State, 1 Walk. (Miss.) 156.

4. Otherwise than lawfully and reasonably belong to the husband for proper government and correction of his wife.

CHAPTER XVI.

OF PARENT AND CHILD.

Children are of two sorts, — legitimate, and spurious, or bastards. [446]

I. **A legitimate child is he that is born in lawful wedlock, or within a competent time afterwards.** *"Pater est quem nuptiae demonstrant"*[5] is the rule of the civil law, and this holds with the civilians whether the nuptials happen before or after the birth of the child.[6] With us in England the rule is narrowed, for the nuptials must be precedent to the birth.

1. First, **the duties of parents to legitimate children** principally consist in three particulars, their maintenance, their protection, and their education.

The duty of parents to provide for the **maintenance** of their children is a principle of natural law. [447] And the children will have the perfect *right* of receiving maintenance from their parents.

It is a principle of our law that there is an obligation on every man to provide for those descended from his loins, and the manner in which this obligation shall be performed is thus pointed out [by the statute 43 Eliz. c. 2]. The father and mother, grandfather and grandmother of poor impotent persons shall maintain them at their own charges, if of sufficient ability, according as the quarter session shall direct; and [stat. 5 Geo. I. c. 8] if a parent runs away and leaves his children, the churchwardens and overseers of the parish shall seize his rents, goods, and chattels, and

5. He is the father whom the nuptials point out.

6. In Illinois "an illegitimate child, whose parents have intermarried, and whose father has acknowledged him or her as his child, shall be considered legitimate." R. S. Ill. Descent, ch. 39, sec. 3. This is the general rule in continental Europe and in Scotland. See Ewell's Med. Jur. (2d Ed.), 181. See also the peculiar statute of New Mexico respecting acknowledging the child in writing. Doubtless there are other statutes affecting the subject, but in the absence of statute the common law rule prevails.

dispose of them toward their relief. By the interpretations which the courts of law have made upon these statutes, if a mother or grandmother marries again, and was before such second marriage of sufficient ability to keep the child, the husband shall be charged to maintain it; for this, being a debt of hers when single, shall, like others, extend to charge the husband. But at her death, the relation being dissolved, the husband is under no further obligation.[7] [449]

No person is bound to provide a maintenance for his issue unless where the children are impotent and unable to work, either through infancy, disease, or accident, and then is only obliged to find them with necessaries, the penalty on refusal being no more than 20*s.* a month.

Our law has made no provision to prevent the disinheriting of children by will, leaving every man's property in his own disposal upon a principle of liberty in this as well as every other action.[8] [450] Heirs and children are favorites of our courts of justice, and cannot be disinherited by any dubious or ambiguous words, there being required the utmost certainty of the testator's intentions to take away the right of an heir.

Protection is also a natural duty, but rather permitted than enjoined by any municipal laws; natural in this respect, working so strongly as to need rather a check than a spur. A parent may by our laws maintain and uphold his children in their lawsuits without being guilty of the legal crime of maintaining quarrels. A parent may also justify an assault and battery in defence of the persons of his children.[9]

7. Independently of the express enactment in 43 Eliz., c. 2, and other subsequent statutes, there is no *legal* obligation at common law on a parent to maintain his child. The subject is generally regulated by statute in the United States. Mortimore v. Wright, 6 M. & W. 482; Kelly v. Davis, 49 N. H. 176; Browne, Dom. Rel., 72. In some of the states, however, it is otherwise and the same rule is enforced as in the case of husband and wife, irrespective of the existence of the relation of agency. See Tiffany, Dom. Rel., 251; Gilley v. Gilley, 79 Me. 292; Brow v. Brightman, 136 Mass. 187; Pretzinger v. Pretzinger, 45 O. St. 452.

8. This is a general rule of the common law in this country.

9. This is also the law in the United States.

The last duty of parents to their children is that of giving them an **education** suitable to their station in life, — a duty pointed out by reason, and of far the greater importance of any.[1] Our laws, though their defects in this particular cannot be denied, have in one instance made a wise provision for breeding up the rising generation, since the poor and laborious part of the community, when past the age of nurture, are taken out of the hands of their parents by the statutes for apprenticing poor children, and are placed out by the public in such a manner as may render their abilities in their several stations of the greatest advantage to the commonwealth. [451]

2. **The power of a parent over his children** by our English laws is much more moderate [than that given by the Roman law], but still sufficient to keep the child in order and obedience. [452] He may lawfully correct his child, being under age, in a reasonable manner, for this is for the benefit of his education.[2] The consent or concurrence of the parent to the marriage of his child under age was also *directed* by our ancient law to be obtained; but now it is absolutely *necessary*, for without it the contract is void. [See *ante*.] A father has no other power over his son's **estate** than as his trustee or guardian;[3] for though he may receive the profits during the child's minority, yet he must account for them when he comes of age. [453] He may indeed have the benefit of his children's labor while they live with him and are maintained by him, but this is no more than he is entitled to from his apprentices or servants.[4] **The legal power of a father** — for a mother, as such, is entitled to no power, but only to reverence and respect — over the persons

1. This is a moral and not a legal obligation unless made such by statute, as is the case in some states. Consult the local statutes. See Browne, Dom. Rel., 71; Tiffany, Dom. Rel., 259.

2. So in this country. The right extends also to one *in loco parentis* (in the place of the parent), as a school teacher. See, generally, Tiffany, Dom. Rel., 264, and cases cited; Browne, Dom. Rel., 75.

3. Tiffany, Dom. Rel., 306, and cases cited.

4. Tiffany, Dom. Rel., 276. On the father's death the mother has the same right. Id.

of his children **ceases at the age of twenty-one.**[5] Yet till that age arrives this empire of the father continues even after his death, for **he may by his will appoint a guardian** to his children. He may also delegate part of his parental authority, during his life, to the tutor or **schoolmaster** of his child, who is then *in loco parentis*, and has such a portion of the power of the parent committed to his charge, viz., that of restraint and correction, as may be necessary to answer the purposes for which he is employed.[5a]

3. **The duties of children to their parents** arise from a principle of natural justice and retribution. For to those who gave us existence we naturally owe **subjection and obedience during our minority,** and honor and reverence ever after. And the Athenian laws carried this principle into practice with a scrupulous kind of nicety, obliging all children to provide for their father when fallen into poverty, with an exception to spurious children, to those whose chastity had been prostituted by consent of the father, and to those whom he had not put in any way of gaining a livelihood. [454]

Our laws agree with those of Athens with regard to the first only of these particulars, the case of spurious issue. In the other cases the law does not hold the tie of nature to be dissolved by any misbehavior of the parent, and therefore a child is equally justifiable in defending the person or maintaining the cause or suit of a bad parent as a good one, and is equally compellable [but by statute only; see 43 Eliz. c. 2.], if of sufficient ability, to maintain and provide the a wicked and unnatural progenitor, as for one who has shown the greatest tenderness and parental piety.[6]

II. **Illegitimate children,** or bastards.

1. **Who are bastards.** A bastard by our English laws is

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5. The age of majority is 21 in this country. In Illinois women, by statute, become of age at 18. An infant reaches his majority at the beginning of the day next preceding the 21st anniversary of his birth. Ewell's Lead. Cases (1st Ed.), 1; Herbert v. Turball, 1 Kehle, 589; State v. Clarke, 3 Harring. 557.

5a. See note, *supra*.

6. Unless the duty is imposed by statute a child is under no legal obligation to support his parents. Tiffany, Dom. Rel., 311, and cases cited.

one that is not only begotten, but born out of lawful matrimony.[7] The civil and canon laws do not allow a child to remain a bastard if the parents afterwards intermarry; and herein they differ most materially from our law, which, though not so strict as to require that the child shall be *begotten*, yet makes it an indispensable condition, to make it legitimate, that it shall be *born* after lawful wedlock.[8] [455] All children born before matrimony are bastards by our law; and so it is of all children born so long after the death of the husband that, by the usual course of gestation, they could not be begotten by him. [456] But this being a matter of some uncertainty, the law is not exact as to a few days.[9] And this gives occasion to a proceeding at common law, where a widow is suspected to feign herself with child in order to produce a suppositious heir to the estate. In this case with us the heir presumptive may have a writ *de ventre inspiciendo* to examine whether she be with child or not, and if she be, to keep her under proper restraint till delivered. But if the widow be upon due examination found not pregnant, the presumptive heir shall be admitted to the inheritance, though liable to lose it again on the birth of a child within forty weeks from the death of a husband. But if a man dies and his widow soon after marries again, and a child is born within such a time as that by the course of nature it might have been the child of either husband, in this case he is said to be more than ordinarily legitimate, for he may when he arrives to years of discretion choose which of the fathers he pleases.[1] [457]

As bastards may be born before the coverture or marriage state is begun or after it is determined, so also children born during wedlock may in some circumstances be bastards.

7. See 2 Taylor's Med. Jur. (2d Am. Ed.), 241; Ewell's Med. Jur. (2d Ed.), 181.

8. See R. S. Ill., ch. 39, sec. 3; Ewell's Med. Jur. (2d Ed.), 181.

9. See, generally, Ewell's Med. Jur. (2d Ed.), 181 *et seq.*, where the subject of legitimacy is considered at length.

1. It is "a question for the jury to determine according to the evidence which husband was most likely to be the father." 1 Broom & Hadley Com., 561, citing Co. Litt. by Harg., 123b, n. 1.

As if the husband be out of the kingdom of England, or, as the law somewhat loosely phrases it, *extra quatuor maria*,[2] for above nine months, so that no access to his wife can be presumed, her issue during that period shall be bastards. But generally during the coverture access of the husband shall be presumed unless the contrary can be shown, which is such a negative as can only be proved by showing him to be elsewhere; for the general rule is, *praesumitur pro legitimatione*.[3] In a divorce *a mensa et thoro*, if the wife breeds children they are bastards, for the law will presume the husband and wife comfortable to the sentence of separation unless access be proved; but in a voluntary separation by agreement the law will suppose access unless the negative be shown. So also if there is an apparent impossibility of procreation on the part of the husband, as if he be only eight years old, or the like, there the issue of the wife shall be bastards. Likewise, in case of divorce in the spiritual court *a vinculo matrimonii*, all the issue born during the coverture are bastards, because such divorce is always upon some cause that rendered the marriage unlawful and null from the beginning. [458]

2. **The duty of parents to their bastard children** by our law is principally that of **maintenance.** For though bastards are not looked upon as children to any civil purposes, yet the ties of nature, of which maintenance is one, are not so easily dissolved. And they hold, indeed, as to many other intentions: as, particularly, that a man shall not marry his bastard sister or daughter.

When a woman is delivered, or declares herself with child, of a bastard, and will by oath before a justice of peace charge any person as having got her with child, the justice shall cause such person to be apprehended, and commit him till he gives security, either to maintain the child, or appear at the next quarter sessions to dispute and try the fact. But if the woman dies, or is married before delivery, or

2. Beyond the four seas. This is no longer law. 1 Broom & Hadley Com., 562.

3. The presumption is in favor of legitimacy. The burden of proof is with him who alleges the illegitimacy. See 1 Broom & Hadley Com., 562; Ewell's Med. Jur., ch. 15.

miscarries, or proves not to have been with child, the person shall be discharged; otherwise the sessions, or two justices out of sessions, upon original application to them, may take order for the keeping of the bastard, by charging the mother or the reputed father with the payment of money or other sustentation for that purpose. And if such putative father or lewd mother run away from the parish, the overseers, by direction of two justices, may seize their rents, goods, and chattels, in order to bring up the said bastard child.[4]

3. I proceed next to **the rights and incapacities which appertain to a bastard.** [459] **The rights are very few,** being only such as he can *acquire,* for he can *inherit* nothing, being looked upon as the son of nobody.[5] Yet he may gain a surname by reputation, though he has none by inheritance. All other children have their primary settlement in their father's parish; but a bastard in the parish where born, for he hath no father. However, in case of fraud, as if a woman be sent either by order of justice, or comes to beg as a vagrant, to a parish where she does not belong to, and drops her bastard there, the bastard shall, in the first case, be settled in the parish from whence she was illegally removed; or, in the latter case, in the mother's own parish, if the mother be apprehended for her vagrancy. Bastards also born in any licensed hospital for pregnant women are settled in the parishes to which the mothers belong. **The incapacity of a bastard** consists principally in this, that he cannot be heir to any one, neither can he have heirs but of his own body; for, being *nullius filius,* he is therefore of kin to nobody, and has no ancestor from whom any inheritable blood can be derived.[6] A bastard may, lastly, be made legitimate, and capable of inheriting, by the transcendent power of an act of parliament, and not otherwise.

4. Consult the local statutes on the subject of Bastards.

5. Consult the local statutes which in some states have modified the harshness of the common law on this subject. See R. S. Ill. (Starr & Curtis' Ed.), ch. 39, ¶ 2; Miller v. Williams, 66 Ill. 91; Stoltz v. Doering, 112 Ill. 234; Elder v. Bales, 127 Ill. 425; 1 N. Y. R. St. 753.

6. See note 2, *supra.*

CHAPTER XVII.

OF GUARDIAN AND WARD.

A guardian is only a temporary parent, that is, for so long time as the ward is an infant, or under age. [460]

1. **The guardian with us performs the office both of the tutor and curator** of the Roman laws; the former of which had the charge of the maintenance and education of the minor, the latter the care of his fortune, or, according to the language of the court of chancery, the *tutor* was the committee of the person, the *curator* the committee of the estate. But this office was frequently united in the civil law, as it is always in our law with regard to minors, though as to lunatics and idiots it is commonly kept distinct.

Of the several species of guardians, the first are **guardians by nature**: viz., the father, and in some cases the mother of the child. For if an estate be left to an infant, the father is by common law the guardian, and must account to his child for the profits. [461] And with regard to daughters, it seems by construction of the statute 4 and 5 Ph. and Mar. c. 8, that the father might by deed or will assign a guardian to any woman-child under the age of sixteen; and, if none be so assigned, the mother shall in this case be guardian. There are also **guardians for nurture**, which are, of course, the father or mother, till the infant attains the age of fourteen years; and in default of father or mother, the ordinary usually assigns some discreet person to take care of the infant's personal estate, and to provide for his maintenance and education.[7] Next are **guardians in socage**, who are also

7. The father and in case of his death the mother, and, if both parents are dead, then the next of kin are the natural guardians of the infant and entitled to his custody during infancy, if there is no sufficient reason to the contrary. He has, however, as such guardian no power over the infant's property. Where the infant has property a guardian should be appointed according to the provisions of the local statutes by which this subject is very generally regulated in the several states. See Tiffany, Dom. Rel., 316-318.

called guardians *by the common law*. These take place only when the minor is entitled to some estate in lands, and then by the common law the guardianship devolves upon his next of kin to whom the inheritance cannot possibly descend. These guardians in socage, like those for nurture, continue only till the minor is fourteen years of age; for then, in both cases, he is presumed to have discretion so far as to choose his own guardian. [462] This he may do, unless one be appointed by the father, by virtue of the statute 12 Car. II. c. 24, which, considering the imbecility of judgment in children of the age of fourteen, and the abolition of guardianship *in chivalry* (which lasted till the age of twenty-one, and of which we shall speak hereafter), enacts that any father, under age or of full age, may by deed or will dispose of the custody of his child, either born or unborn, to any person, except a popish recusant, either in possession or reversion, till such child attains the age of one and twenty years. These are called **guardians by statute, or testamentary guardians.**[8]

The power and reciprocal duty of a guardian and ward are the same, pro tempore, as that of a father and child; and therefore I shall not repeat them, but shall only add that the guardian, when the ward comes of age, is bound to give him an **account** of all that he has transacted on his behalf, and must answer for all losses by his wilful default or negligence. [463] In order, therefore, to prevent disagreeable contests with young gentlemen, it has become a practice for many guardians, of large estates especially, to indemnify themselves by applying to the Court of Chancery, acting under its direction, and accounting annually before the officers of that court. For the Lord Chancellor is, by right derived from the crown, the general and supreme guardian of all infants, as well as idiots and lunatics. In case, therefore, any guardian abuses his trust, the court will check and punish him; nay, sometimes will proceed to the removal of him, and appoint another in his stead.[9]

8. The provisions of this statute have been substantially re-enacted in many of the states. Consult the local statutes. See Tiffany, Dom. Rel., 318.

9. In the United States jurisdiction

2. **The ages of male and female are different for different purposes.** **A male** at *twelve* years old may take the oath of allegiance; at *fourteen* is at years of discretion, and therefore may consent or disagree to marriage, may choose his guardian, and, if his discretion be actually proved, may make his testament of his personal estate; at *seventeen* may be an executor; and at *twenty-one* is at his own disposal, and may alien his lands, goods, and chattels. **A female** also at *seven* years of age may be betrothed or given in marriage; at *nine* is entitled to dower; at *twelve* is at years of maturity, and therefore may consent or disagree to marriage, and, if proved to have sufficient discretion, may bequeath her personal estate; at *fourteen* is at years of legal discretion, and may choose a guardian; at *seventeen* may be executrix; and at *twenty-one* may dispose of herself and her lands. So that **full age** in male or female is twenty-one years, which age is completed on the day preceding the anniversary of a person's birth, who till that time is an infant, and so styled in law.

3. **Infants have various privileges and various disabilities**; but their very disabilities are privileges, in order to secure them from hurting themselves by their own improvident acts. **An infant cannot be sued** but under the protection, and joining the name of his guardian, for he is to defend him against all attacks as well by law as otherwise; **but he may sue** either by his guardian or *prochein amy*,[9a] his next friend who is not his guardian. This *prochein amy* may be any person who will undertake the infant's cause; and it frequently happens that an infant, by his *prochein amy*, institutes a suit in equity against a fraudulent guardian.[1] **In criminal cases**, an infant of the age of *fourteen*

over guardianship is usually by statute vested in probate, surrogate, orphans', or county courts. Courts of chancery, however, in the absence of prohibitory statutory provisions, have jurisdiction to appoint guardians over the persons and property of infants. Tiffany, Dom. Rel., 320.

9a. Next friend.

1. It is well settled that an infant defendant cannot appear in person or by attorney; but must appear by guardian (*ad litem* for the particular case, if he has no general guardian); and the guardian must be a real and not a fictitious person, such as "John

years may be capitally punished for any capital offence, but under the age of *seven* he cannot. The period between *seven* and *fourteen* is subject to much uncertainty, for the infant shall, generally speaking, be judged *prima facie* innocent; yet if he was *doli capax,* and could discern between good and evil at the time of the offence committed, he may be convicted and undergo judgment and execution of death, though he hath not attained to years of puberty or discretion.[2]

With regard to estates and civil property, an infant hath many privileges, which will be better understood when we come to treat more particularly of those matters; but this may be said in general, that an infant shall lose nothing by **non-claim,** or neglect of demanding his right; nor shall any other **laches** or negligence be imputed to an infant, except in some very particular cases. [465]

It is generally true that an infant can neither aliene his lands, nor do any legal act, nor make a deed, nor indeed any manner of contract that will bind him. But still to all these rules there are some **exceptions,** part of which were just now mentioned in reckoning up the different capacities which they assume at different ages; and there are others, a few of which it may not be improper to recite. And first, it is true that infants cannot aliene their estates; but **infant trustees, or mortgagees, are enabled to convey,** under the direction of the Court of Chancery or Exchequer, or other courts of equity, the estates they hold in trust or mortgage, to such person as the court shall appoint. Also it is generment. [466] It is, further, generally true that **an infant who has had an advowson may present to the benefice** when it becomes void. **An infant may also purchase lands,** but his purchase is incomplete; for when he comes to age he may either agree or disagree to it, as he thinks prudent or

Doe." But after the appointment of a guardian, if an attorney appears and pleads, it will be presumed that he is properly authorized so to do. See the subject of appearance by infants and the effect of judgments and decrees against them, fully considered in the notes to Mills v. Dennis, 3 John. Ch. 367; s. c., Ewell's Lead. Cases (1st Ed.), 229-238; Tiffany, Dom. Rel., 323.

2. See *post,* Criminal Law.

proper, without alleging any reason; and so may his heirs after him if he dies without having completed his agreement. [466] It is, further, generally true that **an infant under twenty-one can make no deed but what is afterwards voidable**; yet in some cases he may bind himself **apprentice** by deed indented, or indentures, for seven years, and he may by deed or will **appoint a guardian to his children,** if he has any. Lastly, it is generally true that an infant can make no other contract that will bind him; yet he may bind himself to pay for his necessary meat, drink, apparel, physic, and such other **necessaries,** and likewise for his good teaching and instruction, whereby he may profit himself afterwards.[3]

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3. As to the liability of infants on their contracts in England, see 37 & 38 Vict., ch. 62. In this country there has been very little legislation on the subject, which therefore remains very much as at common law, though involved in great conflict of authority. Considering the conflict and the number of cases, about all that can be done at this point is to state that the general tendency of authority, except as below stated, is to hold all an infant's contracts voidable and not void, though in some states powers of attorney, appointments of agents, contracts of suretyship, and bonds with penalties are void.

Certain contracts are valid and binding upon the infant. Such are contracts created or authorized by law, implied (not express) contracts for necessaries and contracts to do what the infant was legally bound and compellable to do. See, generally, Tiffany, Dom. Rel., 386-425; Ewell's Lead. Cases (1st Ed.), 3-188, and notes.

The voidable (and not the void) executory contracts of an infant may be ratified by him after reaching majority, but, until so ratified, do not bind him. Executed voidable contracts on the other hand are binding upon the infant till disaffirmed by him. Tiffany, Dom. Rel., 400-402, and notes.

The voidable executory contracts of an infant may be avoided by him during infancy as well as afterwards. So too all contracts respecting property which are executed by delivery of some article on payment of money may be rescinded by the minor either before or after majority; but conveyances of real property in fee, for life, or for years, cannot be avoided till the infant reaches full age. See, generally, Tiffany, Dom. Rel., 403 *et seq.*; Ewell's Lead. Cases (1st Ed.), 92, 96, notes; Reeve's Dom. Rel., *254.

An infant is liable upon his pure torts not growing out of contract. Homer v. Thwing, 3 Pick. 492; Ewell's Lead. Cases (1st Ed.), 188, 206, note.

As to criminal liability, see *post*, book 4.

CHAPTER XVIII.

OF CORPORATIONS.

As all personal rights die with the person, and as the necessary forms of investing a series of individuals, one after another, with the same identical rights, would be very inconvenient if not impracticable, it has been found necessary, when it is for the advantage of the public to have any particular rights kept on foot and continued, to constitute **artificial persons**, who may maintain a perpetual succession, and enjoy a kind of legal immortality. [467]

These artificial persons are called bodies politic, bodies corporate (*corpora corporata*), or corporations. When they [the individuals composing a corporations] are consolidated and united into a corporation, they and their successors are then considered as one person in law. [468] As one person they have one will, which is collected from the sense of the majority of the individuals. This one will may establish rules and orders for the regulation of the whole, which are a sort of municipal laws of this little republic, or rules and statutes may be prescribed to it at its creation, which are then in the place of natural laws. The privileges and immunities, the estates and possessions of the corporation, when once vested in them will be forever vested without any new conveyance to new successions; for all the individual members that have existed from the foundation to the present time, or that shall ever hereafter exist, are but one person in law, — a person that never dies: in like manner as the River Thames is still the same river, though the parts which compose it are changing every instant.

The first division of corporation is into *aggregate* and *sole*.[4] [469] **Corporations aggregate** consist of many persons united together into one society, and are kept up by a per-

4. See generally as to the classification of corporations, Clark on Corp. (2d Ed.), 23.

petual succession of members so as to continue forever. **Corporations sole** consist of one person only and his successors, in some particular station, who are incorporated by law in order to give them some legal capacities and advantages, particularly that of perpetuity, which in their natural persons they could not have had. In this sense the king is a sole corporation; so is a bishop; so are some deans and prebendaries, distinct from their several chapters; and so is every parson and vicar.[5]

Another division of incorporations, either sole or aggregate, is into *ecclesiastical* and *lay*. [470] **Ecclesiastical corporations** are where the members that compose them are entirely spiritual persons, such as bishops, certain deans and prebendaries, all archdeacons, parsons, and vicars, which are sole corporations, deans and chapters at present, and formerly prior and convent, abbot and monks, and the like bodies aggregate. These are erected for the furtherance of religion and perpetuating the rights of the church.[6] **Lay corporations** are of two sorts, *civil* and *eleemosynary*. **The civil** are such as are erected for a variety of temporal purposes. The king, for instance, is made a corporation to prevent in general the possibility of an *interregnum* or vacancy of the throne, and to preserve the possessions of the crown entire. Other lay corporations are erected for the good government of a town or particular district [471] [with us called **municipal corporations**];[7] some for the ad-

5. Roman Catholic bishops hold the title to church property in some of the states as corporations sole; there may be other instances but they are very few. See Brunswick v. Dunning, 7 Mass. 447; Westcott v. Fargo, 61 N. Y. 542; Overseers of Poor of Boston v. Sears, 22 Pick. 122; Clark on Corporations (2d Ed.), 24.

6. In the United States religious societies and eleemosynary corporations are, as a rule, incorporated under general laws as lay corporations. The method of incorporation may differ from that adopted in the case of corporations for pecuniary profit, but they are not ecclesiastical corporations in the sense of the text. See R. S. Ill., ch. 32 (Starr & Curtis' Ed.), ch. 32, sec. 35, and notes; Robertson v. Bullions, 11 N. Y. 243.

7. The literature on the subject of municipal corporations is voluminous. Dillon on Municipal Corporations is in its 5th (1911) edition and comprises 5 volumes; Abbott's work on the same subject (1905) comprises 3 volumes, and McQuillin's (1911) 6

vancement and regulation of manufactures and commerce, and some for the better carrying on of divers special purposes, as churchwardens, for conservation of the goods of the parish, the college of physicians and company of surgeons in London, for the improvement of the medical science, &c. **The eleemosynary sort** are such as are constituted for the perpetual distribution of the free alms or bounty of the founder of them to such persons as he has directed. Of this kind are all hospitals for the maintenance of the poor, sick, and impotent, &c. And all these eleemosynary corporations are, strictly speaking, lay and not ecclesiastical, even though composed of ecclesiastical persons, and

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volumes. Others might be referred to. See Bender's Law Book Catalogue, 1914, titles Municipal Bonds; Municipal Law, etc.

The literature upon the general law of corporations is even more voluminous. See Bender's Law Catalogue, titles Corporations; Foreign Corporations, etc.

Chief Justice Marshall thus describes a corporation: "A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of the law, it possesses only those properties which the charter of its creation confers upon it, either expressly or as incidental to its very existence. These are such as are supposed to be best calculated to effect the object for which it is created. Among the most important are *immortality*, and, if the expression may be allowed, *individuality*—properties by which a perpetual succession of many persons are considered as the same, and may act as a single individual. They enable a corporation to manage its own affairs and to hold property without the perplexing intricacy, the hazardous and endless necessity of perpetual conveyances for the purpose of transmitting it from hand to hand. It is chiefly for the purpose of clothing bodies of men in succession with these qualities and capacities, that corporations were invented and are in use. By these means a perpetual succession of individuals are capable of acting for the promotion of the particular object like one immortal being." Dartmouth College v. Woodward, 4 Wheat. 636.

"Municipal corporations are bodies politic and corporate of the general character above described, established by law, to share in the civil government of the country, but chiefly to regulate and administer the local or internal affairs of the city, town or district which is incorporated. Like other corporations, they must be created by statute. They possess no powers or faculties not conferred upon them either expressly or by fair implications by the law which creates them or other statutes applicable to them." 1 Dillon's Mun. Corp. (2d Ed.), ch. 2, sec. 9a, 9b.

although they in some things partake of the nature, privileges, and restrictions of ecclesiastical bodies.

Let us next proceed to consider, 1. How corporations in general may be created [472]; 2. What are their powers, capacities, and incapacities; 3. How corporations are visited; and 4. How they may be dissolved.

I. **With us in England the king's consent is absolutely necessary to the erection of any corporation,** either impliedly or expressly given. The king's implied consent is to be found in corporations which exist **by force of the common law,** to which our former kings are supposed to have given their concurrence. Of this sort are the king himself, all bishops, parsons, vicars, churchwarders, and some others. Another method of implication, whereby the king's consent is presumed, is as to all corporations **by prescription,**[8] such as the city of London and many others which have existed as corporations, time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created. [473] For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one, and that by the variety of accidents which a length of time may produce the charter is lost or destroyed. The methods by which the king's consent is expressly given are either by **act of parliament or charter.** By act of parliament, of which the royal assent is a necessary ingredient, corporations may undoubtedly be created.

All the other methods, therefore, whereby corporations exist, by common law, by prescription, and by act of parliament, are for the most part reducible to this of **the king's letters patent, or charter of incorporation.** The king's creation may be performed by the words "*creamus, erigimus, fundamus, incorporamus,*"[9] or the like. Nay, it is held that

8. This doctrine has been frequently applied in the United States as to municipal corporations. Jamison v. People, 16 Ill. 257; Clark on Corp. (2d Ed.), 31. It has also been applied to private corporations. Clark on Corp. (2d Ed.), 31, 6 Conn. 293. See, also, Robie v. Sedgwick, 35 Barb. 319; Chittenden v. Chittenden, 1 Am. Law Rep. 538.

9. We create, erect, found, incorporate.

if the king grants to a set of men to have *gildam mercatoriam* (a mercantile meeting or assembly) this is alone sufficient to incorporate and establish them forever. [474]

The parliament, by its absolute and transcendent authority, may perform this or any other act whatsoever.[1]

The king, it is said, may grant to a subject the power of erecting corporations, though the contrary was formerly held: that is, he may permit the subject to name the persons and powers of the corporation at his pleasure. But it is really the king that erects, and the subject is but the instrument; for though none but the king can make a corporation, yet *qui facit per alium, facit per se.*[2]

When a corporation is erected, a **name** must be given to it; and by that name alone it must sue and be sued and do all legal acts, though a very minute variation therein is not material. [475] Such name is the very being of its constitution, and, though it is the will of the king that erects the corporation, yet the name is the knot of its combination, without which it could not perform its corporate functions.[3]

II. **After a corporation is so formed and named it acquires**

1. Corporations, of whatever sort, are with us almost entirely created by statute, either special or general, though usually, and in some states by constitutional provision, only by general law, private or special laws being prohibited by the constitution. These general laws prescribe the purposes for which and the methods by which incorporation may be effected. As they differ in the several states, the local statutes should be consulted.

Besides corporations, we have in this country unincorporated so-called joint stock companies, which, as a rule, are merely copartnerships and subject to all the rules governing that branch of the law. See 2 Lindley on Part. (Ewell's Ed.), ch. 5, p. 758.

We have also, principally in the state of New York, joint stock corporations organized under or regulated by statute, and possessing practically all the attributes of corporations except that of having a common seal. In Westcott v. Fargo, 61 N. Y. 542, the president or treasurer of such an association was regarded for the purposes of an action against the company, substantially as a corporation sole. For details as to these associations, see 2 Lindley on Part. (Ewell's Ed.), ch. 5, p. 758 *et seq.*

2. He who acts by another, acts himself. Neither the president of the United States nor a governor of a state has with us the power to create a corporation.

3. See, generally, Clark on Corp. (2d Ed.), 83. Sometimes these are statutory restrictions as to the name. Id.

many powers, rights, capacities, and incapacities, which we are next to consider. Some of these are necessarily and inseparably incident to every corporation, which **incidents,** as soon as a corporation is duly erected, are tacitly annexed of course. As, 1. **To have perpetual succession.** This is the very end of its incorporation, for there cannot be a succession forever without an incorporation, and therefore all aggregate corporations have a power necessarily implied of electing members in the room of such as go off.[4] 2. **To sue or be sued, implead or be impleaded, grant or receive by its corporate name,** and do all other acts as natural persons may.[5] 3. **To purchase lands and hold them** for the benefit of themselves and their successors, which two are consequential to the former.[6] 4. **To have a common seal.**[7] For a corporation, being an invisible body, cannot manifest its intentions by any personal act or oral discourse; it therefore acts and speaks only by its common seal. [Seal not necessary in the United States as to most acts.] 5. **To make by-laws**[8] or private statutes for the better government of the corporation, which are binding upon themselves, unless contrary to the laws of the land [or unreasonable], and then they are void. These five powers are inseparably incident to every corporation, at least to every corporation *aggregate;* for two of them, though they may be practised, yet are very unnecessary to a corporation *sole,* viz., to have a corporate seal to testify his sole assent, and to make statutes for the regulation of his own conduct.

There are also certain **privileges and disabilities** that attend an aggregate corporation, and are not applicable to such as are sole, the reason of them ceasing, and of course the law. **It must always appear by attorney.** It can neither maintain or be made defendant to an action of **battery,** or such like personal injuries, for a corporation can neither

4. See Clark on Corp. (2d Ed.), 11, 13. Private corporations are commonly limited in duration by the statute creating them to a certain number of years. Id., note.

5. Clark of Corp. (2d Ed.), 14. See as to acts *ultra vires,* Id., ch. 6.

6. Id., 17.

7. Id., 17.

8. Id., 17.

beat nor be beaten in its body politic.[9] **A corporation cannot commit treason**, or felony, or other crime, in its corporate capacity, though its members may in their distinct individual capacities.[1] Neither is it capable of suffering a traitor's or felon's punishment, for it is not liable to corporal penalties, nor to attainder, forfeiture, or corruption of blood. [477] **It cannot be executor or administrator**, or perform any personal duties, for it cannot take an oath for the due execution of the office.[2] **It cannot be seised of lands to the use of another**, for such kind of confidence is foreign to the end of its institution.[3] **Neither can it be committed to prison**, for, its existence being ideal, no man can apprehend or arrest it.

There are also **other incidents and powers** which belong to some sort of corporations and not to others. An **aggregate corporation** may take goods and chattels for the benefit of themselves and their successors, but a sole corporation cannot.[4] **In ecclesiastical and eleemosynary foundations the king or the founder may give them rules, laws, statutes, and ordinances**, which they are bound to observe; but corporations merely lay, constituted for civil purposes, are subject to no particular statutes, but to the common law and to their own by-laws not contrary to the laws of the

9. "A private corporation is liable for the torts of its servants and agents committed in the course of their employment to the same extent as a natural person would be, and it may be liable for wrongs involving a mental element, as malicious wrongs, fraud, etc." Clark on Corp. (2d Ed.), 193 *et seq.*, where the cases are fully collected.

1. While a corporation cannot commit a crime involving a mental operation or personal violence, it may be criminally liable for the nonperformance of a duty imposed on it by law and in most states for some acts of misfeasance, such as maintaining a nuisance. Id. 198 and cases cited in notes.

2. *Contra*, if so authorized by its charter. Id. 123 and cases cited.

3. When authorized to take real and personal property, it may hold the same in trust; if the trust is repugnant to or inconsistent with the purposes of the corporation, it cannot be compelled to execute the trust; but the court will appoint a new trustee to effectuate a trust otherwise unobjectionable. Id. 123, 124 and cases cited.

4. Clark on Corp. (2d Ed.), 24; 2 Kent Com., 273, 274.

realm.[5] [478] Aggregate corporations, also, that have by their constitutions a head, as a dean, warden, master, or the like, cannot do any **acts during the vacancy of the headship**, except only appointing another; neither are they then capable of receiving a grant, for such corporation is incomplete without a head. But there may be a corporation aggregate constituted without a head. In aggregate corporations, also, the act of the major part is esteemed the act of the whole. With us *any* **majority** is sufficient to determine the act of the whole body.[6]

We before observed that it was incident to every corporation to have a capacity **to purchase lands** for themselves and successors, and this is regularly true at the common law. [479] But they are **excepted out of the statute of wills**, so that no devise of lands to a corporation by will is good, except for charitable uses, by statute 43 Eliz. c. 4, which exception is again greatly narrowed by the statute 9 Geo. II. c. 36. And also, by a great variety of statutes, their privilege even of purchasing from any living grantor is much abridged, so that now a corporation, either ecclesiastical or lay, must have a license from the king to purchase before they can exert that capacity which is vested in them by the common law; nor is even this in all cases sufficient. These statutes are generally called **the statutes of mortmain**, all purchases made by corporate bodies being said to be purchases in *mortmain, in mortua manu*,[7] for the reason that these purchases being usually made by ecclesiastical bodies, the members of which (being professed) were reckoned dead persons in law, land therefore holden by them might with great propriety be said to be held *in mortua manu*.[8]

The general duties of all bodies politic, considered in their corporate capacity, may, like those of natural persons,

5. By-laws must be consistent with its charter and not unreasonable. Clark on Corp. (2d Ed.), 442, 444.

6. But not *ultra vires*. Id. 430.

7. In dead hand.

8. The statutes of mortmain except in Pennsylvania have not been adopted in this country. Clark on Corp. (2d Ed.), 120; 2 Kent Com., 281-283; Methodist Church v. Remington, 1 Watts. 219; Runyan v. Coster, 14 Peters, 122.

be reduced to this single one, that of acting up to the end or design, whatever it be, for which they were created by their founder. [480]

III. **How may these corporations be visited.**

The law has provided proper persons to visit, inquire into, and correct all irregularities that arise in such corporations, either sole or aggregate, and whether ecclesiastical, civil, or eleemosynary. **With regard to all ecclesiastical corporations** the ordinary is their visitor, so constituted by the canon law, and from thence derived to us. The pope formerly, and now the king, as supreme ordinary, is the visitor of the archbishop or metropolitan; the metropolitan has the charge and coercion of all his suffragan bishops, and the bishops in their several dioceses are in ecclesiastical matters the visitors of all deans and chapters, of all parsons and vicars, and of all other spiritual corporations. **With respect to all lay corporations,** the founder, his heirs or assigns, are the visitors whether the foundation be civil or eleemosynary.

The founder of all corporations in the strictest and original sense is the king alone, for he only can incorporate a society; and in civil incorporations, such as a mayor and commonalty, &c., where there are no possessions or endowments given to the body, there is no other founder but the king. But in eleemosynary foundations, such as colleges and hospitals, where there is an endowment or lands, the law distinguishes and makes two species of foundation: the one *fundatio incipiens,* or the incorporation, in which sense the king is the general founder of all colleges and hospitals; the other *fundatio perficiens,* or the dotation of it, in which sense the first gift of the revenues is the foundation, and he who gives them is in law the founder; and it is in this last sense that we generally call a man the founder of a college or hospital. [481] But here the king has his prerogative; for if the king and a private man join in endowing an eleemosynary foundation, the king alone shall be the founder of it. And in general, the king being the sole founder of all civil corporations, and the endower the perficient founder

of all eleemosynary ones, the right of visitation of the former results, according to the rule laid down, to the king, and of the latter to the patron or endower.

The king being thus constituted by law visitor of all civil corporations, the law has also appointed the place wherein he shall exercise this jurisdiction, which is the Court of King's Bench,[9] where, and where only, all misbehaviors of this kind of corporations are inquired into and redressed, and all their controversies decided.

As to eleemosynary corporations, by the dotation the founder and his heirs are of common right the legal visitors, to see that such property is rightly employed, as might otherwise have descended to the visitor himself; but if the founder has appointed and assigned any other person to be visitor, then his assignee so appointed is invested with all the founder's power, in exclusion of his heir. [482] Eleemosynary corporations are chiefly hospitals or colleges in the universities. And with regard to hospitals, if the hospital be spiritual the bishop shall visit; but if lay, the patron.

Whatever might be formerly the opinion of the clergy, it is now held as established common law that **colleges are lay corporations,** though sometimes totally composed of ecclesiastical persons, and that the right of visitation does not arise from any principles of the canon law, but of necessity was created by the common law. By the common law the office of visitor is to judge according to the statutes of the college, and to expel and deprive upon just occasions, and to hear all appeals of course; and from him and him only the party grieved ought to have redress, the founder

9. As to the powers of the state over corporations, see, generally, Clark on Corp. (2d Ed.), ch. 8. It is now well settled that the charter of a private corporation is a contract within the protection of that clause of the United States constitution declaring that "no state shall pass any law impairing the obligation of contracts." Dartmouth College v. Woodward, 4 Wheat. 518; Clark on Corp. (2d Ed.), 202.

The legal process for inquiring into any excess of its powers by a corporation is by an information in the nature of a *quo warranto,* considered later.

having reposed in him so entire a confidence that he will administer justice impartially, that his determinations are final and examinable in no other court whatsoever. [484] But where the visitor is under a temporary disability, there the Court of King's Bench will interpose to prevent a defect of justice. Also it is said that if a founder of an eleemosynary foundation appoints a visitor and limits his jurisdiction by rules and statutes, if the visitor in his sentence exceeds those rules, an action lies against him; but it is otherwise where he mistakes in a thing within his power.

IV. **How may corporations be dissolved.**

Any particular member may be disfranchised or lose his place in the corporation by acting contrary to the laws of the society or the laws of the land, or he may **resign** it by his own voluntary act. But the body politic may also itself be dissolved in several ways, which dissolution is the civil death of the corporation; and in this case their **lands and tenements shall revert** to the person or his heirs who granted them to the corporation; for the law doth annex a condition to every such grant, that, if the corporation be dissolved, the grantor shall have the lands again, because the cause of the grant faileth. The grant is indeed only during the life of the corporation, which *may* endure forever; but when that life is determined by the dissolution of the body politic, the grantor takes it back by reversion, as in the case of every other grant for life. **The debts of a corporation**, either to or from it, are totally extinguished by its dissolution, so that the members thereof cannot recover or be charged with them in their natural capacities.[1]

A corporation may be dissolved:[1a] 1. **By act of parliament,** which is boundless in its operations[2] [485]; 2. **By**

1. This rule does not apply to private business corporations. On their dissolution their assets both real and personal are administered for the benefit first of their creditors and afterwards for the stockholders. Clark on Corp. (2d Ed.), 121, 247, 248 and cases cited in notes.

1a. See, generally, Clark on Corp. (2d Ed.), ch. 9.

2. Not so with us where the charter constitutes a contract. See Dartmouth College v. Woodward, cited *supra*. It is now a common practice to reserve in the act of incorporation

the natural death of all its members, in case of an aggregate corporation; 3. **By surrender of its franchises** into the hands of the king, which is a kind of suicide; 4. **By forfeiture of its charter** through negligence or abuse of its franchises, in which case the law judges that the body politic has broken the condition upon which it was incorporated, and thereupon the incorporation is void. And the regular course is to bring an **information in nature of a writ of quo warranto**, to inquire by what warrant the members now exercise their corporate power, having forfeited it by such and such proceedings.[3]

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er charter the right to amend or repeal at legislative discretion.

3. The state only can enforce a forfeiture. The procedure is often prescribed by statute. When not so prescribed, *scire facias* is the proper common law method where there is a legal existing body capable of acting but which has abused its power; *quo warranto* is the proper method where a body is corporate *de facto* only. Clark on Corp. (2d Ed.), 241, 243.

BOOK THE SECOND.

OF THE RIGHTS OF THINGS.

CHAPTER I.

OF PROPERTY IN GENERAL.[1]

There is nothing which so generally strikes the imagination and engages the affections of mankind as the **right of property,** or that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe. [2]

In the beginning of the world, we are informed by Holy Writ, the All-bountiful Creator gave to man "dominion over all the earth, and over the fish of the sea, and over the fowl of the air, and over every living thing that moveth upon the earth." [3] This is the only true and solid foundation of man's dominion over external things. The earth, therefore, and all things therein are the general property of all mankind, exclusive of other beings, from the immediate gift of the Creator. And, while the earth continued bare of inhabitants, it is reasonable to suppose that all was in common among them, and that every one took from the public stock to his own use such things as his immediate necessities required.

These general notions of property were then sufficient to answer all the purposes of human life, and might perhaps still have answered them, had it been possible for mankind to have remained in a state of primeval simplicity; as may be collected from the manners of many American nations when first discovered by the Europeans, and from the ancient method of living among the first Europeans themselves. Not that this **community of goods** seems ever to have been applicable, even in the earliest stages, to aught but the *substance* of the thing; nor could it be extended to the *use* of it. For by the law of nature and reason, he who first began to use it acquired therein a kind of transient property that lasted so long as he was using it, and no longer; or, to speak with greater precision, the *right* of possession continued for the same time only that the *act* of possession lasted. Thus the ground was in com-

1. See, generally, upon this subject Maine's Ancient Law, 244 *et seq.*

mon, and no part of it was the permanent property of any man in particular. Yet whoever was in the occupation of any determined spot of it, for rest, for shade, or the like, acquired for the time a sort of ownership, from which it would have been unjust and contrary to the law of nature to have driven him by force; but the instant that he quitted the use or occupation of it, another might seize it without injustice. Thus also a vine or other tree might be said to be in common, as all men were equally entitled to its produce; and yet any private individual might gain the sole property of the fruit which he had gathered for his own repast. [4]

But when mankind increased in number, craft, and ambition, it became necessary to entertain conceptions of **more permanent dominion,** and to appropriate to individuals, not the immediate *use* only, but the very *substance* of the thing to be used. Otherwise innumerable tumults must have arisen, and the good order of the world be continually broken and disturbed, while a variety of persons were striving who should get the first occupation of the same thing, or disputing which of them had actually gained it. As human life also grew more and more refined, abundance of conveniences were devised to render it more easy, commodious, and agreeable, as habitations for shelter and safety, and raiment for warmth and decency. But no man would be at the trouble to provide either, so long as he had only an usufructuary property in them, which was to cease the instant that he quitted possession,—if, as soon as he walked out of his tent or pulled off his garment, the next stranger who came by would have a right to inhabit the one and to wear the other. In the case of **habitations** in particular, it was natural to observe that even the brute creation, to whom everything else was in common, maintained a kind of permanent property in their dwellings, especially for the protection of their young,—that the birds of the air had nests and the beasts of the field had caverns, the invasion of which they esteemed a very flagrant injustice, and would sacrifice their lives to preserve them. Hence a property was soon established in every man's house and home-stall, which seem to have been originally mere temporary huts or movable cabins, suited to the design of Providence for more speedily peopling the earth, and suited to the wandering life of their owners, before any extensive property in the soil or ground was established. [5] And there can be no doubt but that **movables** of every kind became sooner appropriated than the permanent substantial soil,—partly because they were more susceptible of a long occupancy, which might be continued for months together without any sensible interruption, and at length by usage ripen into an established right, but principally because few of them could be fit for use till improved and meliorated by the bodily labor of the occupant, which bodily labor, bestowed upon any subject which before lay in common to all men, is universally allowed to give the **fairest and most reasonable title to an exclusive property therein.**

The article of **food** was a more immediate call, and therefore a more early consideration. Such as were not contented with the spontaneous product of the earth, sought for a more solid refreshment in the flesh of beasts, which they obtained by hunting. But the frequent disappointments incident to that method of provision induced them to gather together such animals as were of a more tame and sequacious nature, and to establish a permanent property in their flocks and herds in order to sustain themselves in a less precarious manner, partly by the milk of the dams, and partly by the flesh of the young. The support of these their cattle made the article of **water** also a very important point. And therefore the book of Genesis (the most venerable monument of antiquity, considered merely with a view to history) will furnish us with frequent instances of violent contentions concerning wells, the exclusive property of which appears to have been established in the first digger or occupant, even in such places where the ground and herbage remained yet in common.

All this while the **soil and pasture of the earth** remained still in common as before, and open to every occupant, except, perhaps, in the neighborhood of towns, where the necessity of a sole and exclusive property in lands (for the sake of agriculture) was earlier felt, and therefore more readily complied with. [6] Otherwise, when the multitude of men and cattle had consumed every convenience on one spot of ground, it was deemed a natural right to seize upon and occupy such other lands as would more easily supply their necessities. This practice is still retained among the wild and uncultivated nations that have never been formed into civil states, like the Tartars and others in the East.

Upon the same principle was founded **the right of migration,** or sending colonies to find out new habitations, when the mother country was overcharged with inhabitants, which was practised as well by the Phoenicians and Greeks as the Germans, Scythians, and other northern people. [7] And so long as it was confined to the stocking and cultivation of desert, uninhabited countries, it kept strictly within the limits of the law of nature.

As the world by degrees grew more populous, it daily became more difficult to find out new spots to inhabit without encroaching upon former occupants, and, by constantly occupying the same individual spot, the fruits of the earth were consumed and its spontaneous produce destroyed, without any provision for future supply or succession. It therefore became necessary to pursue some regular method of providing a constant subsistence, and this necessity produced, or at least promoted and encouraged, **the art of agriculture.** And the art of agriculture, by a regular connection and consequence, introduced and established the idea of a more permanent property in the soil than had hitherto been received and adopted. It was clear that the earth would not produce her fruits in sufficient quantities without the assistance of tillage; but who would

be at the pains of tilling it if another might watch an opportunity to seize upon and enjoy the product of his industry, art, and labor? Had not, therefore, a separate property in lands as well as movables been vested in some individuals, the world must have continued a forest, and men have been mere animals of prey, which, according to some philosophers, is the genuine state of nature. Whereas now,—so graciously has Providence interwoven our duty and our happiness together,—the result of this very necessity has been the ennobling of the human species, by giving it opportunities of improving its *rational* faculties, as well as of exerting its *natural*. [8] **Necessity begat property;** and in order to insure that property, recourse was had to civil society, which brought along with it a long train of inseparable concomitants; states, government, laws, punishments, and the public exercise of religious duties. Thus connected together, it was found that a part only of society was sufficient to provide by their manual labor for the necessary subsistence of all, and leisure was given to others to cultivate the human mind, to invent useful arts, and to lay the foundations of science.

The only question remaining is, **How this property became actually vested,** or what it is that gave a man an exclusive right to retain in a permanent manner that specific *land* which before belonged generally to everybody, but particularly to nobody. **And as we before observed that occupancy gave the right to the temporary use of the soil, so it is agreed upon all hands that occupancy gave also the original right to the permanent property in the substance of the earth itself,** which excludes every one else but the owner from the use of it.[2]

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2. Mr. Locke says, "that the labour of a man's body, and the work of his hands, we may say are properly his. Whatsoever then he removes out of the state that nature hath provided and left it in, he hath mixed his labour with, and joined to it something that is his own, and thereby makes it his property." (*On Gov.*, c. 5.)

But this argument seems to be a *petitio principii;* for mixing labour with a thing, can signify only to make an alteration in its shape or form; and if I had a right to the substance, before any labour was bestowed upon it, that right still adheres to all that remains of the substance, whatever changes it may have undergone; if I had no right before, it is clear that I have none after; and we have not advanced a single step by this demonstration.

The account of Grotius and Puffendorf, who maintain that the origin and inviolability of property are founded upon a tacit promise or compact, and therefore we cannot invade another's property without a violation of a promise or a breach of good faith, seems equally, or more, superfluous and inconclusive.

There appears to be just the same necessity to call in the aid of a promise to account for, or enforce, every other moral obligation, and to say that men are bound not to beat or murder each other, because they have promised not to do so. Men are bound to fulfil their contracts and engagements, because society could not oth-

Property, both in lands and movables, being thus originally acquired by the first taker, which taking amounts to a declaration that he intends to appropriate the thing to his own use, it remains in him, by the principles of universal law, till such time as he does some other act which shows an intention to abandon it: for then it becomes, naturally speaking, *publici juris* [2a] once more, and is liable to be again appropriated by the next occupant. [9] So if one is possessed of a jewel, and casts it into the sea or a public highway, this is such **an express dereliction** that a property will be vested in the first fortunate finder that will seize it to his own use. But if he **hides it privately** in the earth or other secret place, and it is discovered, the finder acquires no property therein, for the owner hath not by this act declared any intention to abandon it, but rather the contrary; and if he loses or drops it by accident, it cannot be collected from thence that he designed to quit the possession, and therefore in such a case the property still remains in the loser, who may claim it again of the finder.

But this method of one man's abandoning his property and another seizing the vacant possession, however well founded in theory, could not long subsist in fact. It was calculated merely for the rudiments of civil society, and necessarily ceased among the complicated interests and artificial refinements of polite and established government. In these it was found that what became inconvenient or useless to one man was highly convenient and useful to another, who was ready to give in exchange for it some equivalent that was equally desirable to the former proprietor. Thus mutual convenience introduced **commercial traffic** and the reciprocal transfer of property by sale, grant, or conveyance, which may be considered either as a continuance of the original possession which the first occupant had, or as an abandoning of the thing by the present owner and an immediate successive occupancy of the same by the new proprietor. [10] The voluntary dereliction of the owner and delivering the possession to another individual amount to a transfer of

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erwise exist; men are bound to refrain from another's property, because likewise society could not otherwise exist. Nothing therefore is gained by resolving one obligation into the other.

But how, or when, then, does property commence? I conceive no better answer can be given, than by occupancy, or when any thing is separated for private use from the common stores of nature. This is agreeable to the reason and sentiments of mankind, prior to all civil establishments. When an untutored Indian has set before him the fruit which he has plucked from the tree that protects him from the heat of the sun, and the shell of water raised from the fountain that springs at his feet; if he is driven by any daring intruder from this repast, so easy to be replaced, he instantly feels and resents the violation of that law of property, which nature herself has written upon the hearts of all mankind.

2a. Of public right.

the property, the proprietor declaring his intention no longer to occupy the thing himself, but that his own right of occupancy shall be vested in the new acquirer. Or, taken in the other light, if I agree to part with an acre of my land to Titius, the deed of conveyance is an evidence of my intending to abandon the property; and Titius, being the only or first man acquainted with such my intention, immediately steps in and seizes the vacant possession. Thus the consent expressed by the conveyance gives Titius a good right against me, and possession, or occupancy, confirms that right against all the world besides.

The most universal and effectual way of abandoning property is by **the death of the occupant,** when, both the actual possession and intention of keeping possession ceasing, the property which is founded upon such possession and intention ought also to cease of course. For, naturally speaking, the instant a man ceases to be, he ceases to have any dominion; else, if he had a right to dispose of his acquisitions one moment beyond his life, he would also have a right to direct their disposal for a million of ages after him, which would be highly absurd and inconvenient. All property must therefore cease upon death, considering men as absolute individuals and unconnected with civil society; for then, by the principles before established, the next immediate occupant would acquire a right in all that the deceased possessed. But as, under civilized governments, which are calculated for the peace of mankind, such a constitution would be productive of endless disturbances, the universal law of almost every nation (which is a kind of secondary law of nature) has either given the dying person a power of continuing his property by **disposing of his possessions by will,** or in case he neglects to dispose of it, or is not permitted to make any disposition at all, the municipal law of the country then steps in and declares who shall be the successor, representative, or heir of the deceased,—that is, who alone shall have a right to enter upon this vacant possession, in order to avoid that confusion which its becoming again common would occasion. [11] And further, in case no testament be permitted by the law, or none be made, and no heir can be found so qualified as the law requires, still, to prevent the robust title of occupancy from again taking place, the doctrine of **escheats** is adopted in almost every country, whereby the sovereign of the state and those who claim under his authority are the ultimate heirs, and succeed to those inheritances to which no other title can be formed.

The right of inheritance, or descent to the children and relations of the deceased, seems to have been allowed much earlier than the right of devising by testament. A man's children or nearest relations are usually about him on his death-bed, and are the earliest witnesses of his decease. [12] They become therefore generally the next immediate occupants, till at length in process of time this frequent usage ripened into general law. And therefore also in the earliest ages, on failure of children a man's servants born under his roof were allowed to be

his heirs, being immediately on the spot when he died. For we find the old patriarch Abraham expressly declaring, that "since God had given him no seed, his steward Eliezer, one born in his house, was his heir."

While property continued only for life, (testaments were useless and unknown; and when it became inheritable the inheritance was long indefeasible, and the children or heirs at law were incapable of exclusion by will. Till at length it was found that so strict a rule of inheritance made heirs disobedient and headstrong, defrauded creditors of their just debts, and prevented many provident fathers from dividing or charging their estates as the exigence of their families required. This introduced pretty generally the right of disposing of one's property, or a part of it, by **testament;** that is, by written or oral instructions properly *witnessed* and authenticated, according to the *pleasure* of the deceased, which we therefore emphatically style his *will*. This was established in some countries much later than in others. With us in England, till modern times, a man could only dispose of one-third of his movables from his wife and children, and in general no will was permitted of lands till the reign of Henry VII. and then only of a certain portion; for it was not till after the Restoration that the power of devising real property became so universal as at present.

Wills, therefore, and testaments, rights of inheritance and successions, are all of them creatures of the civil or municipal laws, and accordingly are in all respects regulated by them, every distinct county having different ceremonies and requisites to make a testament completely valid; neither does anything vary more than the right of inheritance under different national establishments. [13]

But, after all, there are **some few things which,** notwithstanding the general introduction and continuance of property, **must still unavoidably remain in common,** being such wherein nothing but an usufructary property is capable of being had, and therefore they still belong to the first occupant during the time he holds possession of them, and no longer. [14] Such (among others) are the elements of **light, air, and water,** which a man may occupy by means of his windows, his gardens, his mills, and other conveniences. Such also are the generality of those **animals** which are said to be **feræ naturæ,**[3] or of a wild and untamable disposition, which any man may seize upon and keep for his own use and pleasure. All these things, so long as they remain in possession, every man has a right to enjoy with-

3. Of a wild nature.

out disturbance; but if once they escape from his custody, or he voluntary abandons the use of them, they return to the common stock, and any man else has an equal right to seize and enjoy them afterwards.[4]

Again, there are other things in which a permanent property *may* subsist, not only as to the temporary use but also the solid substance, and which yet would be frequently found without a proprietor, had not the wisdom of the law provided a remedy to obviate this inconvenience. Such are **forests and other waste grounds** which were omitted to be appropriated in the general distribution of lands; such also are **wrecks, estrays,** and that species of wild animals which the arbitrary constitutions of positive law have distinguished from the rest by the well-known appellation of **game.**[5] With regard to these and some others, as disturbances and quarrels would frequently arise among individuals contending about the acquisition of this species of property by first occupancy, the law has therefore wisely cut up the root of dissension by vesting the things themselves in the sovereign of the state, or else in his representatives appointed and authorized by him, being usually the lords of manors. [15] And thus the legislature of England has universaly promoted the grand ends of civil society, the peace and security of individuals, by steadily pursuing that wise and orderly **maxim, of assigning to everything capable of ownership a legal and determinate owner.**

4. See Ewell on Fixtures (2d Ed.), *241 and notes.

5. Consult local statutes regulating the taking of game.

CHAPTER II.

OF REAL PROPERTY; AND, FIRST, OF CORPOREAL HEREDITAMENTS.

The objects of dominion or property are *things* as contradistinguished from *persons;* and things are by the law of England distributed into two kinds, things *real* and things *personal.* [16] **Things real** are such as are permanent, fixed, and immovable, which cannot be carried out of their place, as lands and tenements; **things personal** are goods, money, and all other movables which may attend the owner's person wherever he thinks proper to go.

First, with regard to their several sorts or kinds, things real are usually said to consist in lands, tenements, or hereditaments. **Land** comprehends all things of a permanent, substantial nature. **Tenement** is a word of still greater extent, and though in its vulgar acceptation it is only applied to houses and other buildings, yet in its original, proper, and legal sense it signifies everything that may be *holden,* provided it be of a permanent nature, whether it be of a substantial and sensible or of an unsubstantial ideal kind. [17] Thus *liberum tenementum,* frank tenement, or freehold, is applicable not only to lands and other solid objects, but also to offices, rents, commons, and the like. And as lands and houses are tenements, so is an advowson a tenement; and a franchise, an office, a right of common, a peerage, or other property of the like unsubstantial kind, are all of them, legally speaking, tenements. But an **hereditament,** says Sir Edward Coke, is by much the largest and most comprehensive expression; for it includes not only lands and tenements, but whatsoever may be *inherited,* be it corporeal or incorporeal, real, personal, or mixed. Thus an **heirloom,**[6] or implement of furniture which by custom

6. We have found no instance where the law of heir-looms has been recognized as a part of the jurisprudence of the United States. See Ewell on Fixtures (2d Ed.), *232 note, where the English law upon this subject is fully considered following Mr. Ferard (Fixtures), 192 *et seq.*

descends to the heir together with a house, is neither land nor tenement, but a mere movable; yet, being inheritable, is comprised under the general word hereditament. And so a **condition,**[7] the benefit of which may descend to a man from his ancestor, is also an hereditament.

Hereditaments are of two kinds, corporal and incorporeal. **Corporeal** consist of such as affect the senses, such as may be seen and handled by the body; **incorporeal** are not the object of sensation, can neither be seen nor handled, are creatures of the mind, and exist only in contemplation.

Corporeal hereditaments consist wholly of substantial and permanent objects, all which may be comprehended under the general denomination of land only. For **land,** says Sir Edward Coke, comprehendeth, in its legal signification, any ground, soil, or earth whatsoever, as arable, meadows, pastures, woods, moors, waters, marshes, furzes, and heath. It legally includeth also all castles, houses, and other buildings; for they consist, said he, of two things, *land,* which is the foundation, and *structure* thereupon, so that if I convey the land or ground, the structure or building passeth therewith. [18] It is observable that **water** is here mentioned as a species of land, which may seem a kind of solecism; but such is the language of the law. And therefore I cannot bring an action to recover possession of a pool or other piece of water by the name of *water* only, either by calculating its capacity, as for so many cubical yards, or by superficial measure, for twenty acres of water, or by general description, as for a pond, a watercourse, or a rivulet; but I must bring my action for the land that lies at the bottom, and must call it twenty acres of *land covered with water.*[8] For water is a movable, wandering thing, and must of necessity continue common by the law of nature, so that I can only have a temporary, transient, usufructuary property therein; wherefore, if a body of water runs out of

7. "In its most extended signification a condition is a clause in a contract or agreement which has for its object to suspend, to rescind, or to modify the principal obligation; or in case of a will, to suspend, revoke or modify the devise or bequest." 1 Bouv. Dict., Condition.

8. Jackson v. Halstead, 5 Cow. 216.

my pond into another man's, I have no right to reclaim it. But the land which that water covers is permanent, fixed, and immovable; and therefore in this I may have a certain substantial property, of which the law will take notice, and not of the other.

Land hath also, in its legal signification, an indefinite extent, upwards as well as downwards.[9] Upwards, therefore, no man may erect any building, or the like, to overhang another's land; and, downwards, whatever is in a direct line, between the surface of any land and the centre of the earth, belongs to the owner of the surface, as is every day's experience in the mining countries. So that the word "land" includes not only the face of the earth, but everything under it or over it.[1] And, therefore, if a man grants all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters, and his houses, as well as his fields and meadows.[2] Not but the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing. [19] But the capital distinction is

9. There has been considerable litigation concerning trees growing on boundary lines. "It matters not that some of the roots [or branches] of the tree are in [or over] the soil of the defendant when the body or main part of the tree is in the soil of the plaintiff, for to this the rest of the tree appertains." Masters v. Pollie, 2 Rolle, 141; Ewell on Fixtures, *64, notes. If, however, the trunk of the tree is on the boundary line and partly upon the land of each of the adjacent proprietors, they are tenants in common of the tree; and neither may cut or destroy it without the consent of the other. Ewell on Fixtures (2d Ed.), *64 note and cases cited.

Growing crops, when not reserved, as a rule are passed to the grantee by a conveyance of the land. Ewell on Fixtures, *252 and notes, where numerous cases on this subject are collected. See, generally, the chapter (7) on Emblements in Ewell on Fixtures, where the subject of crops is considered in all its relations.

1. As to the right of aviation over private property, see 18 Law Notes (July, 1914), 62; Davids on the Law of Motor Vehicles, secs. 290, 291.

2. Growing crops, trees, minerals, houses, fixtures, etc., may be sold and conveyed separately from the land and thus constructively severed from it so as to become subject to the rules governing personal property. So they may be expressly reserved from a conveyance of the land with the same effect. See Ewell on Fixtures, *45, 46 and notes.

this, that by the name of a castle,[3] messuage, toft, croft, or the like, nothing else will pass except what falls with the utmost propriety under the terms made use of. But by the name of land, which is *nomen generalissimum*,[4] everything terrestrial will pass.

3. A conveyance of a building will pass the land upon which it is situated. Esty v. Currier, 98 Mass. 502.

4. A most general name.

CHAPTER III.

OF INCORPOREAL HEREDITAMENTS.

An incorporeal hereditament is a right issuing out of a thing corporate (whether real or personal), or concerning, or annexed to, or exercisable within the same. [20] It is not the thing corporate itself, which may consist in lands, houses, jewels, or the like, but something collateral thereto, as a rent issuing out of those lands or houses, or an office relating to those jewels. In short, corporeal hereditaments are the substance which may be always seen, always handled; incorporeal hereditaments are but a sort of accidents which inhere in and are supported by that substance, and may belong or not belong to it without any visible alteration therein. Their existence is merely in idea and abstracted contemplation, though their effects and profits may be frequently objects of our bodily senses. And indeed, if we would fix a clear notion of an incorporeal hereditament, we must be careful not to confound together the profits produced and the thing or hereditament which produces them.

Incorporeal hereditaments are principally of ten sorts: advowsons, tithes, commons, ways, offices, dignities, franchises, corodies or pensions, annuities,[6] and rents. [21]

I. **Advowson** is the right of presentation to a church, or ecclesiastical benefice.

II. **Tithes** are defined to be the tenth part of the increase yearly arising and renewing from the profits of lands, the stock upon lands, and the personal industry of the inhabitants. [24] Tithes are due of common right to the parson of the parish, unless there be a special exemption. [28]

III. **Common, or right of common,** is a profit which a man hath in the land of another, as to feed his beasts, to catch fish, to dig turf, to cut wood, or the like. [32] And hence common is chiefly of four sorts: common of pasture or piscary, of turbary, and of estovers.

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6. "Neither tithes, advowsons, commons, as understood in England, offices, dignities, corodies, nor pensions, are known to the American law as things of which an estate can be predicated, and annuities are but claims of a personal nature." 2 Wash. Real Prop., *4.

1. **Common of pasture** is a right of feeding one's beasts on another's land; for in those waste grounds which are usually called commons, the property of the soil is generally in the lord of the manor, as in common fields it is in the particular tenants. This kind of common is either appendant, appurtenant (because of vicinage), or in gross.

Common appendant is a right belonging to the owners or occupiers of arable land to put commonable beasts upon the lord's waste and upon the lands of other persons within the same manor. [33] Commonable beasts are either beasts of the plough, or such as manure the ground. This is a matter of most universal right, and it was originally permitted, not only for the encouragement of agriculture, but for the necessity of the thing. For when lords of manors granted out parcels of land to tenants, for services either done or to be done, these tenants could not plough or manure the land without beasts, these beasts could not be sustained without pasture, and pasture could not be had but in the lord's wastes, and on the uninclosed fallow grounds of themselves and the other tenants. The law therefore annexed this right of common, as inseparably incident to the grant of the lands. And this was the original of common appendant. **Common appurtenant** ariseth from no connection of tenure, nor from any absolute necessity, but may be annexed to lands in other lordships, or extend to other beasts besides, such as are generally commonable, as hogs, goats, or the like, which neither plough nor manure the ground. This not arising from any natural propriety or necessity, like common appendant, is therefore not of general right, but can only be claimed by immemorial usage and prescription. **Common because of vicinage,** or neighborhood, is where the inhabitants of two townships which lie contiguous to each other have usually intercommoned with one another, the beasts of the one straying mutually into the other's fields without any molestation from either. This is indeed only a permissive right, intended to excuse what in strictness is a trespass in both, and to prevent a multiplicity of suits, and therefore either township may enclose and bar out the other, though they have intercommoned time out of mind. Neither hath any person of one town a right to put his beasts originally into the other's common; but if they escape, and stray thither of themselves, the law winks at the trespass. [34] **Common in gross,** or at large, is such as is neither appendant nor appurtenant to land, but is annexed to a man's person, being granted to him and his heirs by deed; or it may be claimed by prescriptive right, as by a parson of a church, or the like corporation sole. This is a separate inheritance, entirely distinct from any landed property, and may be vested in one who has not a foot of ground in the manor.

2, 3. **Common of piscary** is a liberty of fishing in another man's water, as **common of turbary** is a liberty of digging turf upon another's ground. There is also a common of digging for coals, minerals, stones, and the like. All these bear a resemblance to common of pasture in many respects, though in one point they go much further, common of pasture

being only a right of feeding on the herbage and vesture of the soil, which renews annually; but common of turbary, and those aforementioned, are a right of carrying away the very soil itself.

4. **Common of estovers,** or *estouviers,*—that is, *necessaries* (from *estoffer,* to furnish),—is a liberty of taking necessary wood, for the use of furniture of a house or farm, from off another's estate. [35] The Saxon word *bote* is used by us as synonymous to the French *estovers,* and therefore **house-bote** is a sufficient allowance of wood to repair or to burn in the house, which latter is sometimes called **fire-bote; plough-bote** and **cart-bote** are wood to be employed in making and repairing all instruments of husbandry; and **hay-bote, or hedge-bote,** is wood for repairing of hay, hedges, or fences.

These botes or estovers must be reasonable ones, and such any tenant or lessee may take off the land let or demised to him, without waiting for any leave, assignment, or appointment of the lessor, unless he be restrained by special covenant to the contrary.

IV. A fourth species of incorporeal hereditaments is that of **ways,**[7] or the right of going over another man's ground. I speak not here of the king's highways, which lead from town to town, nor yet of common ways, leading from a

7. An easement is defined by Mr. Hopkins in his work on Real Property (1896) as "a right in the owner of one parcel of land by reason of such ownership, to use the land of another for a special purpose not inconsistent with the general property in the latter." Hopkins, Real Prop., 349; citing 2 Wash. Real Prop., 25. Easements may be created by grant, prescription or adverse use for the time required by the statute of limitations. Hopkins, Real Prop., 350-354.

A right of way is defined by Mr. Hopkins as "an easement in favor of an individual or class of individuals to have a passage on an established line over land of the servient owner to and from land of the dominant owner." Hopkins, Real Prop., 359.

Rights of way frequently arise by implication, as where land granted is represented as bounded or reached by a street, or where a map showing such a street is referred to in a deed. They may also be implied from the necessity of the case. See, generally, Hopkins, Real Prop., 359 and cases cited in the notes.

Easements of light and air over an adjacent lot, while existing in England, are generally repudiated in this country, though recognized in a few states. See the cases collected in Hopkins, Real Prop., 363, 364. See also as to lateral and subjacent support, easements in water, etc. Hopkins, Real. Prop., 365, 366, 368 and cases cited. See, generally, as to easements Washburn on Easements; Goddard on Easements, and Jones on Easements (1898).

village into the fields, but of private ways, in which a particular man may have an interest and a right, though another be owner of the soil. This may be granted on a special permission, as when the owner of the land **grants** to another the liberty of passing over his grounds to go to church, to market, or the like, in which case the gift or grant is particular, and confined to the grantee alone. It dies with the person, and, if the grantee leaves the country, he cannot assign over his right to any other, nor can he justify taking another person in his company. [36] A way may be also by **prescription**, as if all the inhabitants of such a hamlet, or all the owners and occupiers of such a farm, have immemorially used to cross such a ground for such a particular purpose; for this immemorial usage supposes an original grant, whereby a right of way thus appurtenant to land or houses may clearly be created. A right of way may also arise **by act and operation of law**; for if a man grants me a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives me a way to come to it, and I may cross his land for that purpose without trespass. For when the law doth give anything to one, it giveth impliedly whatsoever is necessary for enjoying the same. By the law of the Twelve Tables at Rome, where a man had the right of way over another's land, and the road was out of repair, he who had the right of way might go over any part of the land he pleased, which was the established rule in public as well as private ways. And the law of England in both cases seems to correspond with the Roman. [True only where the owner of the land is by grant or prescription under obligation to repair the way.]

V. **Offices**, which are a right to exercise a public or private employment, and to take the fees and emoluments thereunto belonging, are also incorporeal hereditaments.[8]

VI. **Dignities** bear a near relation to offices. [37] Of the nature of these we treated at large in the former book. It will therefore be here

8. No offices are hereditary in this country and hence none are hereditaments.

sufficient to mention them as a species of incorporeal hereditaments, wherein a man may have a property or estate.[9]

VII. **Franchises** are a seventh species. Franchise and liberty are used as synonymous terms, and their definition is a royal privilege, or branch of the king's prerogative, subsisting in the hands of a subject. Being therefore derived from the crown, they must arise from the king's grant, or in some cases may be held by prescription, which, as has been frequently said, presupposes a grant. It is a franchise for a number of persons to be incorporated and subsist as a body politic, with a power to maintain perpetual succession, and do other corporate acts, and each individual member of such corporation is also said to have a franchise, or freedom.[1]

VIII. **Corodies** are a right of sustenance, or to receive certain allotments of victual and provision for one's maintenance. [40] In lieu of which (especially when due from ecclesiastical persons) a pension or sum of money is sometimes substituted. And these may be reckoned another species of incorporeal hereditaments, though not chargeable on or issuing from any corporeal inheritance, but only charged on the person of the owner in respect of such his inheritance.

IX. **Annuities,** which are much of the same nature, only that these arise from temporal, as the former from spiritual, persons. An annuity is a thing very distinct from a rent-charge, with which it is frequently confounded; a rent-charge being a burthen imposed upon and issuing out of *lands*, whereas an annuity is a yearly sum chargeable only upon the *person* of the grantor. Therefore, if a man by deed grant to another the sum of 20*l. per annum*, without expressing out of what lands it shall issue, no lands at all shall be charged with it, but it is a mere personal annuity, which is of so little account in the law, that if granted to an eleemosynary corporation it is not within the statutes of mortmain; and yet a man may have a real estate in it, though his security is merely personal.

X. **A rent** is defined to be a certain profit[2] issuing yearly out of lands and tenements corporeal. [41] **It must be a profit:** yet there is no occasion for it to be, as it usually is, a sum of money, for spurs, capons, horses, corn, and other matters may be rendered, and frequently are rendered, by way of rent. It may also consist in services or manual operations, as, to plough so many acres of ground, to attend

9. The same remarks as in note 8 apply to dignities.

1. The word franchise is with us usually applied to the right to be a corporation.

2. The incorporeal hereditament rent is not the profit itself, but the right to receive such profit.

the king or the lord to the wars, and the like, — which services in the eye of the law are profits. **This profit must also be certain**; or that which may be reduced to a certainty by either party. **It must also issue yearly**: though there is no occasion for it to issue every successive year; but it may be reserved every second, third, or fourth year; yet, as it is to be produced out of the profits of lands and tenements, as a recompense for being permitted to hold or enjoy them, it ought to be reserved yearly, because those profits do annually arise and are annually renewed. **It must issue out of the thing granted**, and not be part of the land or thing itself, wherein it differs from an exception in the grant, which is always of part of the thing granted. **It must, lastly, issue out of lands and tenements corporeal**, that is, from some inheritance whereunto the owner or grantee of the rent may have recourse to distrein. Therefore a rent cannot be reserved out of an advowson, a common, an office, a franchise, or the like. But a grant of such annuity or sum may operate as a personal contract and oblige the grantor to pay the money reserved, or subject him to an action of debt; though it doth not affect the inheritance, and is no legal rent in contemplation of law.

There are at common law three manner of rents, rent-service, rent-charge, and rent-seck. **Rent-service** is so called because it hath some corporeal service incident to it, as at the least fealty or his feodal oath of fidelity. [42] For if a tenant holds his land by fealty and ten shillings rent, or by the service of ploughing the lord's land and five shillings rent, these pecuniary rents, being connected with personal services, are therefore called rent-service. And for these, in case they be behind, or arrere, at the day appointed, the lord may **distrein**[3] of common right, without reserving

3. The right of distress at common law was a right of detainer and did not carry the right to sell the thing distrained. 1 Bouvier Law Dict. title, Distress; 3 Bl. Com., 6. The right to distrain for rent exists in some of the states and has been abolished in others. See Hopkins, Real Prop., 146. In Illinois it has been modified by statute so that after distress taken the landlord must proceed in court. See Rev. St. Ill., ch. 80, sec. 17 *et seq.* For a discussion of the common law of distress, see the leading case of

any special power of distress, provided he hath in himself the reversion, or future estate of the lands and tenements, after the lease or particular estate of the lessee or grantee is expired. **A rent-charge** is where the owner of the rent hath no future interest or reversion expectant in the land; as where a man by deed maketh over to others his *whole* estate in fee-simple, with a certain rent payable thereout, and adds to the deed a covenant or clause of distress, that if the rent be arrere, or behind, it shall be lawful to distrein for the same. In this case the land is liable to the distress, not of common right, but by virtue of the clause in the deed, and therefore it is called a rent-*charge*, because in this manner the land is charged with a distress for the payment of it. **Rent-seck**, *reditus siccus*, or barren rent, is in effect nothing more than a rent reserved by deed, but without any clause of distress.

There are also other species of rents, which are reducible to these three. **Rents of assise** are the certain established rents of the freeholders and ancient copyholders of a manor, which cannot be departed from or varied. Those of the freeholders are frequently called *chief*-rents, *reditus capitales*. And both sorts are indifferently denominated *quit*-rents, *quieti reditus*, because thereby the tenant goes quit and free of all other services. **Rack-rent** is only a rent of the full value of the tenement, or near it. [43] **A fee-farm rent** is a rent-charge issuing out of an estate in fee, of at least one-fourth of the value of the lands at the time of its reservation.

These are the general divisions of rents; but the difference between them (in respect to the remedy for recovering them) is now totally abolished [Stat. 4 Geo. II. c. 28], and all persons may have the like remedy by distress for rents-seck, rents of assise, and chief-rents, as in case of rents reserved upon lease.

Rent is regularly due and payable upon the land from whence it issues if no particular place is mentioned in the reservation; but in case of the king, the payment must be either to his officers at the exchequer, or to his receiver in the country. And strictly the rent is demandable and payable before the time of sunset of the day whereon it is reserved, though perhaps not absolutely due till midnight.[4]

Simpson v. Hartopp, Willes, 512; 1 Smith's Lead Cas. (9th Am. Ed.), 720-736.

4. See the local statutes.

CHAPTER IV.

OF THE FEODAL SYSTEM.

The constitution of feuds had its original from the military policy of the northern or Celtic nations, the Goths, the Huns, the Franks, the Vandals, and the Lombards, who all, migrating from the same *officina gentium*, poured themselves in vast quantities into all the regions of Europe, at the declension of the Roman empire. [45] It was brought by them from their own countries, and continued in their respective colonies as the most likely means to secure their new acquisitions; and to that end, large districts or parcels of land were allotted by the conquering general to the superior officers of the army, and by them dealt out again in smaller parcels or allotments to the inferior officers and most deserving soldiers. These allotments were called *feoda*, feuds, fiefs, or fees; which last appellation in the northern language signifies a conditional stipend or reward. Rewards or stipends they evidently were, and the condition annexed to them was that the possessor should do service faithfully, both at home and in the wars, to him by whom they were given; for which purpose he took the *juramentum fidelitatis*, or oath of fealty, and in case of the breach of this condition and oath, by not performing the stipulated service or by deserting the lord in battle, the lands were again to revert to him who granted them.

Allotments thus acquired naturally engaged such as accepted them to defend them, and as they all sprang from the same right of conquest, no part could subsist independent of the whole; wherefore all givers as well as receivers were mutually bound to defend each other's possessions. [46] But as that could not effectually be done in a tumultuous, irregular way, government, and to that purpose subordination, was necessary. Every receiver of lands, or feudatory, was therefore bound, when called upon by his benefactor, or immediate lord of his feud or fee, to do all in his power to defend him. Such benefactor or lord was likewise subordinate to and under the command of his immediate benefactor or superior, and so upwards to the prince or general himself; and the several lords were also reciprocally bound, in their respective graduations, to protect the possessions they had given. Thus the feodal connection was established, a proper military subjection was naturally introduced, and an army of feudatories was always ready enlisted, and mutually prepared to muster, not only in defence of each man's own several property, but also in defence of the whole and of every part of this their newly-acquired country,—the produce of which constitution was soon sufficiently visible in the strength and spirit with which they maintained their conquests.

This feodal polity, which was by degrees established over all the con-

tinent of Europe, seems not to have been received in this part of our island, at least not universally and as a part of the national constitution, till the reign of William the Norman. [48] Not but that it is reasonable to believe, from abundant traces in our history and laws, that even in the times of the Saxons, who were a swarm from what Sir William Temple calls the same northern hive, something similar to this was in use, yet not so extensively, nor attended with all the rigor that was afterwards imported by the Normans. For the Saxons were firmly settled in this island at least as early as the year 600, and it was not till two centuries after that feuds arrived at their full vigor and maturity, even on the continent of Europe.

This introduction, however, of the feudal tenures into England by King William does not seem to have been effected immediately after the Conquest, nor by the mere arbitrary will and power of the conqueror, but to have been gradually established by the Norman barons and others in such forfeited lands as they received from the gift of the conqueror, and afterwards universally consented to by the great council of the nation, long after his title was established. Indeed from the prodigious slaughter of the English nobility at the battle of Hastings and the fruitless insurrections of those who survived, such numerous forfeitures had accrued that he was able to reward his Norman followers with very large and extensive possessions, which gave a handle to the monkish historians, and such as have implicitly followed them, to represent him as having by right of the sword seized on all the lands of England, and dealt them out again to his own favorites,—a supposition grounded upon a mistaken sense of the word *conquest*, which in its feodal acceptation signifies no more than *acquisition* [see, however, Hume's Hist. of Eng. ch. 4]; and this has led many hasty writers into a strange historical mistake, and one which, upon the slightest examination, will be found to be most untrue. [49] However, certain it is that the Normans now began to gain very large possessions in England, and their regard for the feodal law under which they had long lived, together with the king's recommendation of this policy to the English, as the best way to put themselves on a military footing, and thereby to prevent any future attempts from the Continent, were probably the reasons that prevailed to effect its establishment here by law. And though the time of this great revolution in our landed property cannot be ascertained with exactness, yet there are some circumstances that may lead us to a probable conjecture concerning it. For we learn from the Saxon Chronicle that in the nineteenth year of King William's reign an invasion was apprehended from Denmark, and the military constitution of the Saxons being then laid aside, and no other introduced in its stead, the kingdom was wholly defenceless, which occasioned the king to bring over a large army of Normans and Bretons, who were quartered upon every landholder, and greatly oppressed the people. This apparent weakness, together with the grievances occasioned by a foreign force, might co-operate

with the king's remonstrances, and the better incline the nobility to listen to his proposals for putting them in a posture of defence. For as soon as the danger was over, the king held a great council to inquire into the state of the nation: the immediate consequence of which was the compiling of the great survey called domesday-book, which was finished in the next year, and in the latter end of that very year the king was attended by all his nobility at Sarum, where all the principal landholders submitted their lands to the yoke of military tenure, became the king's vassals, and did homage and fealty to his person. This may possibly have been the era of formally introducing the feodal tenures by law.

This new polity, therefore, seems not to have been *imposed* by the conqueror but nationally and freely adopted by the general assembly of the whole realm, in the same manner as other nations of Europe had before adopted it, upon the same principle of self-security. [50] And in particular they had the recent example of the French nation before their eyes, which had gradually surrendered up all its *allodial*, or free, lands into the king's hands, who restored them to the owners as a *beneficium*, or feud, to be held to them and such of their heirs as they previously nominated to the king; and thus by degrees all the allodial estates in France were converted into feuds, and the freemen became the vassals of the crown. The only difference between this change of tenures in France and that in England was that the former was effected gradually by the consent of private persons, the latter was done at once all over England by the common consent of the nation. [51]

The grand and fundamental maxim of all feodal tenure is this: that all lands were originally granted out by the sovereign, and are therefore holden, either mediately or immediately, of the crown.[1] [53] The grantor was called the proprietor, or *lord*, being he who retained the dominion, or ultimate property of the feud or fee; and the grantee, who had only the use and possession according to the terms of the grant, was styled the feudatory, or *vassal*, which was only another name for the tenant, or holder of the lands.

Though, on account of the prejudices which we have justly conceived against the doctrines that were afterwards *grafted* on this system, we

1. In this country land is held *in allodio*, that is every tenant in fee simple has an absolute and perfect title; yet in technical language his estate is called an estate in fee simple, and the tenure free and common socage, as to which see *post*, *80; 1 Bouvier Law Dict. *allodium;* 3 Kent Com. 390. The feudal system has, however, furnished the terminology of our law of real estate and hence should be understood by the student.

now use the word *vassal* opprobriously, as synonymous to slave or bondman, the manner of the grant was by words of gratuitous and pure donation, *dedi et concessi*, which are still the operative words in our modern infeodations, or deeds of feoffment. This was perfected by the ceremony of corporal investiture, or open and notorious delivery of possession in the presence of the other vassals, which perpetuated among them the era of the new acquisition at a time when the art of writing was very little known, and therefore the evidence of property was reposed in the memory of the neighborhood, who, in case of a disputed title, were afterwards called upon to decide the difference, not only according to external proofs adduced by the parties litigant, but also by the internal testimony of their own private knowledge.

Besides an oath of *fealty*, or profession of faith to the lord, which was the parent of our oath of allegiance, the vassal or tenant upon investiture did usually *homage* to his lord, openly and humbly kneeling, being ungirt, uncovered, and holding up his hands both together between those of the lord who sate before him, and there professing that "he did become his *man*, from that day forth, of life and limb and earthly honor;" and then he received a kiss from his lord,—which ceremony was denominated *homagium* or *manhood*, by the feudists, from the stated form of words, *devenio vester homo*.[2] [54]

When the tenant had thus professed himself to be the man of his superior or lord, the next consideration was concerning the *service* which, as such, he was bound to render in recompense for the land that he held. This, in pure, proper, and original feuds, was only twofold: to follow or do *suit* to the lord in his courts in time of peace, and in his armies or warlike retinue when necessity called him to the field.

At the first introduction of feuds, as they were gratuitous, so also they were precarious, and held at the *will* of the lord, who was then the sole judge whether his vassal performed his services faithfully. [55] Then they became certain for one or more *years*. Among the ancient Germans they continued only from year to year, an annual distribution of lands being made by their leaders in their general councils or assemblies. This was professedly done lest their thoughts should be diverted from war to agriculture, lest the strong should encroach upon the possessions of the weak, and lest luxury and avarice should be encouraged by the erection of permanent houses and too curious an attention to convenience and the elegant superfluities of life. But when the general migration was pretty well over and a peaceable possession of the new-acquired settlements had introduced new customs and manners, when the fertility of the soil had encouraged the study of husbandry and an affection for the spots they had cultivated began naturally to arise in the tillers, a more permanent degree of property was introduced, and feuds began now to be granted for the *life* of the feudatory.

2. I become your man.

But still feuds were not yet *hereditary*, though frequently granted by the favor of the lord to the children of the former possessor, till in process of time it became unusual, and was therefore thought hard, to reject the heir if he were capable to perform the services; and therefore infants, women, and professed monks, who were incapable of bearing arms, were also incapable of succeeding to a genuine feud. [56] But the heir when admitted to the feud which his ancestor possessed used generally to pay a fine or acknowledgment to the lord, in horses, arms, money, and the like, for such renewal of the feud, which was called a relief, because it raised up and re-established the inheritance, or, in the words of the feodal writers, "*incertam et caducam hereditatem relevabat.*"[3] This relief was afterwards, when feuds became absolutely hereditary, continued on the death of the tenant, though the original foundation of it had ceased.

For in process of time feuds came by degrees to be universally extended beyond the life of the first vassal to his *sons*, or perhaps to such one of them as the lord should name, and in this case the form of the donation was strictly observed. For if a feud was given to a man and his *sons*, all his sons succeeded him in equal portions, and as they died off, their shares reverted to their lord, and did not descend to their children, or even to their surviving brothers, as not being specified in the donation. But when such a feud was given to a man and his *heirs* in general terms, then a more extended rule of succession took place; and when the feudatory died, his male descendants *in infinitum*[4] were admitted to the succession. When any such descendant who thus had succeeded died, his male descendants were also admitted in the first place, and in defect of them such of his male collateral kindred as were of the blood or lineage of the first feudatory, but no others. For this was an unalterable maxim in feodal succession, that "none was capable of inheriting a feud but such as was of the blood of, that is, lineally descended from, the first feudatory." And the descent, being thus confined to males, originally extended to all the males alike, all the sons without any distinction of primogeniture succeeding to equal portions of the father's feud. But this being found upon many accounts inconvenient (particularly by dividing the services, and thereby weakening the strength of the feodal union), and *honorary* feuds (or titles of nobility) being now introduced which were not of a divisible nature, but could only be inherited by the eldest son, in imitation of these, *military* feuds (or those we are now describing) began also in most countries to descend, according to the same rule of primogeniture, to the eldest son, in exclusion of all the rest. [57]

Other qualities of feuds were, that the feudatory could not aliene or dispose of his feud, neither could he exchange, nor yet mortgage, nor

3. It raised up the uncertain and fallen inheritance.

4. In infinity.

even devise it by will, without the consent of the lord. For the reason of conferring the feud being the personal abilities of the feudatory to serve in war, it was not fit he should be at liberty to transfer this gift, either from himself or from his posterity, who were presumed to inherit his valor, to others who might prove less able. And as the feodal obligation was looked upon as reciprocal, the feudatory being entitled to the lord's protection in return for his own fealty and service, therefore the lord could no more transfer his seignory or protection without consent of his vassal, than the vassal could his feud without consent of his lord: it being equally unreasonable that the lord should extend his protection to a person to whom he had exceptions, and that the vassal should owe subjection to a superior not of his own choosing.

These were the principal and very simple qualities of the genuine or original feuds, which were all of a military nature and in the hands of military persons, though the feudatories, being under frequent incapacities of cultivating and manuring their own lands, soon found it necessary to commit part of them to inferior tenants, obliging them to such returns in service, corn, cattle, or money, as might enable the chief feudatories to attend their military duties without distraction, which returns, or *reditus*, were the original of rents. And by these means the feodal polity was greatly extended, these inferior feudatories (who held what are called in the Scots law "rere-fiefs") being under similar obligations of fealty to do suit of court, to answer the stipulated renders or rent-service, and to promote the welfare of their immediate superiors or lords. But this at the same time demolished the ancient simplicity of feuds, and an inroad being once made upon their constitution, it subjected them, in a course of time, to great varieties and innovations. [58] Feuds began to be bought and sold, and deviations were made from the old fundamental rules of tenure and succession, which were held no longer sacred when the feuds themselves no longer continued to be purely military. Hence these tenures began now to be divided into *feoda propria et impropria*,—proper and improper feuds,—under the former of which divisions were comprehended such and such only of which we have before spoken, and under that of improper or derivative feuds were comprised all such as do not fall within the other descriptions,—such, for instance, as were originally bartered and sold to the feudatory for a price; such as were held upon base or less honorable services, or upon a rent, in lieu of military service; such as were in themselves alienable, without mutual license; and such as might descend indifferently either to males or females. But where a difference was not expressed in the creation, such new created feuds did in all respects follow the nature of an original, genuine, and proper feud.

CHAPTER V.

OF THE ANCIENT ENGLISH TENURES.

In this chapter we shall take a short view of the ancient tenures of our English estates, or the manner in which lands, tenements, and hereditaments might have been holden, as the same stood in force till the middle of the last century. [59]

Almost all the real property of this kingdom is, by the policy of our laws, supposed to be granted by, dependent upon, and holden of, some superior lord,[1] by and in consideration of certain services to be rendered to the lord by the tenant or possessor of this property. The thing holden is therefore styled a **tenement,** the possessors thereof **tenants,** and the manner of their possession a **tenure.** Thus all the land in the kingdom is supposed to be holden, mediately or immediately, of the king, who is styled the **lord paramount,** or above all. Such tenants as held under the king immediately, when they granted out portions of their lands to inferior persons, became also lords with respect to those inferior persons, as they were still tenants with respect to the king; and, thus partaking of a middle nature, were called **mesne, or middle lords.** In this manner are all the lands of the kingdom holden which are in the hands of subjects; for, according to Sir Edward Coke, in the law of England we have not properly *allodium,* which we have seen is the name by which the feudists abroad distinguish such estates of the subject as are not holden of any superior. [60]

All tenures being thus derived, or supposed to be derived, from the king, those that held immediately under him in right of his crown and dignity were called his **tenants in capite,** or in chief, which was the most honorable species of tenure, but at the same time subjected the tenants to greater and more burthensome services than inferior tenures did. This distinction ran through all the different sorts of tenure, of which I now proceed to give an account.

There seems to have subsisted among our ancestors **four principal species of lay tenures** to which all others may be reduced, the grand criteria of which were the natures of the several services or renders that were due to the lords from their tenants. The services, in respect of their quality, were either *free* or *base* services; in respect of their quantity and the time of exacting them, were either *certain* or *uncertain.* **Free services** were such as were not unbecoming the character of a soldier or a freeman to perform, as to serve under his lord in the wars, to pay a sum of money, and the like. [61] **Base services** were such as were only fit for peasants or persons of a servile rank, as to plough the

1. See *ante,* p. *52, note.

lord's land, to make his hedges, to carry out his dung, or other mean employments. **The certain services,** whether free or base, were such as were stinted in quantity, and could not be exceeded on any pretence, as to pay a stated annual rent, or to plough such a field for three days. **The uncertain** depended upon unknown contingencies; as, to do military service in person, or pay an assessment in lieu of it when called upon, or to wind a horn whenever the Scots invaded the realm, which are free services, or to do whatever the lord should command, which is a base or villein service.

From the various combinations of these services have arisen the **four kinds of lay tenure** which subsisted in England till the middle of the last century, and three of which subsist to this day. Of these Bracton (who wrote under Henry III.) seems to give the clearest and most compendious account of any author, ancient or modern, of which the following is the outline or abstract: "Tenements are of two kinds: **frank-tenement** and **villenage.** And of frank-tenements, some are held freely in consideration of homage and *knight-service;* others in *free-socage*, with the service of fealty only." And again: "Of villenages, some are pure and others privileged. He that holds in *pure villenage* shall do whatever is commanded him, and always be bound to an uncertain service. The other kind of villenage is called *villein-socage*, and these villein-socmen do villein services, but such as are certain and determined." Of which the sense seems to be as follows: First, where the service was *free* but *uncertain*, as military service with homage, that tenure was called the tenure in chivalry (*per servitium militare*), or by knight-service. [62] Secondly, where the service was not only *free*, but also *certain*, as by fealty only, by rent and fealty, &c., that tenure was called *liberum socagium*, or free socage. These were the only *free* holdings or tenements, the others were *villenous* or servile; as, thirdly, where the service was *base* in its nature and *uncertain* as to time and quantity, the tenure was *purum villenagium* (absolute, or pure villenage). Lastly, where the service was *base* in its nature but reduced to a *certainty*, this was still villenage, but distinguished from the other by the name of privileged villenage (*villenagium privilegiatum*); or it might be still called socage (from the certainty of its services), but degraded by their *baseness* into the inferior title of *villanum socagium* (villein-socage).

I. The first, most universal, and esteemed the most honorable species of tenure, was that by **knight-service.** This differed in very few points, as we shall presently see, from a pure and proper feud, being entirely military, and the general effect of the feodal establishment in England. To make a tenure by knight-service, a determinate quantity of land was necessary, which was called a knight's fee (*feodum militare*), the measure of which in 3 Edw. I. was estimated at twelve ploughlands, and its value (though it varied with the times) in the reign of Edward I. and Edward II. was stated at 20*l. per annum.* And he who held this proportion of land (or a whole fee) by knight-service was bound to attend his lord to

the wars for forty days in every year if called upon, which attendance was his *reditus*, or return, his rent or service for the land he claimed to hold. If he held only half a knight's fee, he was only bound to attend twenty days, and so in proportion.

This tenure of knight-service had all the marks of a strict and regular feud. It was granted by words of pure donation (*dedi et concessi*), was transferred by investiture or delivering corporal possession of the land, usually called livery of seisin, and was perfected by homage and fealty. [63] It also drew after it these seven fruits and consequences, as inseparably incident to the tenure in chivalry, viz.: aids, relief, primer seisin, wardship, marriage, fines for alienation, and escheat.

1. **Aids** were originally mere benevolences granted by the tenant to his lord in times of difficulty and distress, but in process of time they grew to be considered as a matter of right and not of discretion. These aids were principally three: First, to ransom the lord's person if taken prisoner; secondly, to make the lord's eldest son a knight,—a matter that was formerly attended with great ceremony, pomp, and expense; thirdly, to marry the lord's eldest daughter, by giving her a suitable portion.

2. **Relief** (*relevium*) was before mentioned as incident to every feodal tenure, by way of fine or composition with the lord for taking up the estate, which was lapsed or fallen in by the death of the last tenant. [65] But though reliefs had their original while feuds were only life-estates, yet they continued after feuds became hereditary, and were therefore looked upon very justly as one of the greatest grievances of tenure, especially when at the first they were merely arbitrary and at the will of the lord, so that if he pleased to demand an exorbitant relief it was in effect to disinherit the heir.

3. **Primer seisin** was a feodal burthen only incident to the king's tenants *in capite*, and not to those who held of inferior or mesne lords. [66] It was a right which the king had, when any of his tenants *in capite*[2] died seised of a knight's fee, to receive of the heir (provided he were of full age) one whole year's profits of the lands if they were in immediate possession, and half a year's profits if the lands were in reversion expectant on an estate for life.

4. These payments were only due if the heir was of full age; but if he was under the age of twenty-one, being a male, or fourteen, being a female, the lord was entitled to the **wardship** of the heir, and was called the guardian in chivalry. [67] This wardship consisted in having the custody of the body and lands of such heir, without any account of the profits, till the age of twenty-one in males and sixteen in females.

5. But before they came of age there was still another piece of authority which the guardian was at liberty to exercise over his infant wards. I mean the **right of marriage** (*maritagium*, as contradistin-

2. In chief.

guished from *matrimony*), which in its feodal sense signifies the power which the lord or guardian in chivalry had of disposing of his infant ward in matrimony. [70] For while the infant was in ward the guardian had the power of tendering him or her a suitable match, without *disparagement* or inequality, which if the infants refused they forfeited the value of the marriage (*valorem maritagii*) to their guardian,—that is, so much as a jury would assess, or any one would *bona fide*[3] give to the guardian for such an alliance. And if the infants married themselves without the guardian's consent, they forfeited double the value (*duplicem valorem maritagii*).

6. Another attendant or consequence of tenure by knight-service was that of **fines** due to the lord for every *alienation*, whenever the tenant had occasion to make over his land to another. [71] This depended on the nature of the feodal connection, it not being reasonable or allowed, as we have before seen, that a feudatory should transfer his lord's gift to another, and substitute a new tenant to do the service in his own stead, without the consent of the lord; and as the feodal obligation was considered as reciprocal, the lord also could not alienate his seignory without the consent of his tenant, which consent of his was called an *attornment*. [72] This restraint upon the lords soon wore away; that upon the tenants continued longer. For when everything came in process of time to be bought and sold, the lords would not grant a license to their tenants to aliene without a fine being paid, apprehending that if it was reasonable for the heir to pay a fine or relief on the renovation of his paternal estate, it was more reasonable that a stranger should make the same acknowledgment on his admission to a newly purchased feud. With us in England these fines seem only to have been exacted from the king's tenants *in capite*,[4] who were never able to aliene without a license; but as to common persons, they were at liberty, by *Magna Carta* and the statute of *quia emptores*[5] (if not earlier), to aliene the whole of their estate, to be holden of the same lord as they themselves held it of before.[6]

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3. In good faith.

4. In chief.

5. Because purchasers.

6. What fruitful sources of revenue these wardships and marriages of the tenants, who held lands by knight's service, were to the crown, will appear from the two following instances, collected among others by Lord Lyttleton, Hist. Hen. II., 2 vol. 296. "John earl of Lincoln gave Henry the Third 3000 marks to have the marriage of Richard de Clare, for the benefit of Matild his eldest daughter; and Simon de Montford gave the same king 10,000 marks to have the custody of the lands and heir of Gilbert de Unfranville, with the heir's marriage, a sum equivalent to a hundred thousand pounds at present." In this case the estate must have been large, the minor young, and the alliance honourable. For, as Mr. Hargrave informs us, who has well described this species of guardianship, "the guardian in chivalry was not accountable for

7. The last consequence of tenure in chivalry was **escheat,** which is the determination of the tenure or dissolution of the mutual bond between the lord and tenant from the extinction of the blood of the latter by either natural or civil means; if he died without heirs of his blood, or if his blood was corrupted and stained by commission of treason or felony, whereby every inheritable quality was entirely blotted out and abolished. [73] In such cases the lands escheated, or fell back to the lord of the fee; that is, the tenure was determined by breach of the original condition expressed or implied in the feodal donation.[7]

The description here given is that of a knight-service proper, which was to attend the king in his wars. There were also **some other species of knight-service,** so called, though improperly, because the service or render was of a free and honorable nature, and equally uncertain as to the time of rendering as that of knight-service proper, and because they were attended with similar fruits and consequences. Such was the tenure by **grand serjeanty** (*per magnum servitium*),[8] whereby the tenant was bound, instead of serving the king *generally* in his wars, to do some special honorary service to the king in person, as to carry his banner, his sword, or the like, or to be his butler, champion, or other officer at

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the profits made of the infant's lands, during the wardship, but received them for his own private emolument, subject only to the bare maintenance of the infant. And this guardianship, being deemed more an interest for the profit of the guardian, than a trust for the benefit of the ward, was saleable and transferable, like the ordinary subjects of property, to the best bidder; and if not disposed of, was transmissible to the lord's personal representatives. Thus the custody of the infant's person, as well as the care of his estate, might devolve upon the most perfect stranger to the infant; one prompted by every pecuniary motive to abuse the delicate and important trust of education, without any ties of blood or regard to counteract the temptations of interest, or any sufficient authority to restrain him from yielding to their influence." Co. Litt. 88, n. 11. One cannot read this without astonishment, that such should continue to be the condition of the country till the year 1660, which, from the extermination of these feudal oppressions, ought to be regarded as a memorable æra in the history of our law and liberty.

7. By the statute of 54 Geo. III., c. 145, it is enacted, that no attainder for felony (after the passing of the act), except in cases of high treason, petit treason, or murder, shall extend to the disinheriting of any heir, or to the prejudice of the right or title of any other person than the offender, during his natural life only; and that it shall be lawful to the person to whom the right or interest of or in any lands, tenements, or hereditaments, after the death of such offender, would have appertained, if no such attainder had been, to enter into the same. See U. S. Const., art. 3, sec. 3, cl. 2, and the constitutions of the several states.

8. By great service.

his coronation. **Tenure by cornage,** which was to wind a horn when the Scots or other enemies entered the land, in order to warn the king's subjects, was (like other services of the same nature) a species of grand serjeanty. [74]

These services, both of chivalry and grand serjeanty, were all personal and uncertain as to their quantity or duration. But the personal attendance in knight-service growing troublesome and inconvenient in many respects, the tenants found means of compounding for it by first sending others in their stead, and in process of time making a pecuniary satisfaction to the lords in lieu of it. This pecuniary satisfaction at last came to be levied by assessments, at so much for every knight's fee, and therefore this kind of tenure was called **scutagium** in Latin, or *servitium scuti*,[9] *scutum* being then a well-known denomination for money. And, in like manner, it was called in our Norman-French *escuage*, being indeed a pecuniary instead of a military service. The first time this appears to have been taken was in the 5 Hen. II., on account of his expedition to Toulouse, but it soon came to be so universal that personal attendance fell quite into disuse. Hence we find in our ancient histories that from this period, when our kings went to war, they levied scutages on their tenants—that is, on all the landholders of the kingdom—to defray their expenses and to hire troops; and these assessments in the time of Hen. II. seem to have been made arbitrarily and at the king's pleasure,—which prerogative being greatly abused by his successors, it became matter of national clamor, and King John was obliged to consent by his *Magna Carta* that no scutage should be imposed without consent of parliament.

At length the military tenures, with all their heavy appendages (having during the usurpation been discontinued), were destroyed at one blow by the statute 12 Car. II. c. 24 [1660], which enacts "that the court of wards and liveries, and all wardships, liveries, primer seisins, and ousterlemains, values, and forfeitures of marriage, by reason of any tenure of the king or others, be totally taken away. And that all fines for alienation, tenures by homage, knight-service, and escuage, and also aids for marrying the daughter or knighting the son, and all tenures of the king *in capite*, be likewise taken away. And that all sorts of tenures, held of the king or others, be turned into free and common socage, save only tenures in frankalmoign, copyholds, and the honorary services (without the slavish part) of grand serjeanty."

9. Service of money.

CHAPTER VI.

OF THE MODERN ENGLISH TENURES.

Although, by the means that were mentioned in the preceding chapter, the oppressive or military part of the feodal constitution itself was happily done away, yet we are not to imagine that the constitution itself was utterly laid aside and a new one introduced in its room, since by the statute 12 Car. II. the tenures of socage and frankalmoign, the honorary services of grand serjeanty, and the tenure by copy of court roll were reserved, — nay, all tenures in general, except frankalmoign, grand serjeanty, and copyhold, were reduced to one general species of tenure, then well known and subsisting, called **free and common socage.** [78]

The military tenure, or that by knight-service, consisted of what were reputed the most free and honorable services, but which in their nature were unavoidably uncertain in respect to the time of their performance. The second species of tenure, or *free-socage,* consisted also of free and honorable services, but such as were liquidated and reduced to an absolute certainty. And this tenure not only subsists to this day, but has in a manner absorbed and swallowed up (since the statute of Charles II.) almost every other species of tenure. And to this we are next to proceed. [79]

II. **Socage,** in its most general and extensive signification, seems to denote a tenure by any certain and determinate service. And in this sense it is by our ancient writers consequently put in opposition to chivalry, or knight-service, where the render was precarious and uncertain.[1]

Socage is of two sorts: **free-socage,** where the services are not only certain but honorable, and **villein-socage,** where the services, though certain, are of a baser nature.

As the grand criterion and distinguishing mark of this species of tenure [free and common socage] are the having

1. See *ante,* p. *52, note.

its renders or services ascertained, it will include under it all other methods of holding free lands by certain and invariable rents and duties, and, in particular, *petit sergeanty*, tenure in *burgage*, and *gavelkind*. [81]

Petit serjeanty bears a great resemblance to grand serjeanty; for as the one is a personal service, so the other is a rent or render, both tending to some purpose relative to the king's person. [82] Petit serjeanty, as defined by Littleton, consists in holding lands of the king by the service of rendering to him annually some small implement of war, as a bow, a sword, a lance, an arrow, or the like.

Tenure in Burgage is described by Glanvil, and is expressly said by Littleton to be but tenure in socage: and it is where the king or other person is lord of an ancient borough in which the tenements are held by a rent certain. It is indeed only a kind of town socage, as common socage, by which other lands are holden, is usually of a rural nature. A borough, as we have formerly seen, is usually distinguished from other towns by the right of sending members to parliament, and, where the right of election is by burgage tenure, that alone is a proof of the antiquity of the borough. Tenure in burgage, therefore, or burgage tenure, is where houses, or lands which were formerly the scite of houses, in an ancient borough are held of some lord in common socage by a certain established rent. The free socage in which these tenements are held seems to be plainly a remnant of Saxon liberty, which may also account for the great variety of customs affecting many of these tenements so held in ancient burgage, the principal and most remarkable of which is that called **Borough English,** so named in contradistinction, as it were, to the Norman customs, viz., that the youngest son, and not the eldest, succeeds to the burgage tenement on the death of his father. [83] Other special customs there are in different burgage tenures, as that, in some, the wife shall be endowed of *all* her husband's tenements, and not of the third part only, as at the common law; and that, in others, a man might dispose of his tenements by will, which in general was not permitted after the Conquest till the reign of Henry VIII., though in the Saxon times it was allowable. [84]

The distinguished properties of tenure in gavelkind [which prevails principally in Kent] are various; some of the principal are these: 1. The tenant is of age sufficient to aliene his estate by feoffment at the age of fifteen. 2. The estate does not escheat in case of an attainder and execution for felony, their maxim being "the father to the bough, the son to the plough." 3. In most places he had a power of devising lands by will before the statute for that purpose was made. 4. The lands descend, not to the eldest, youngest, or any one son only, but to all the sons together, which was indeed anciently the most usual course of descent all over England, though in particular places particular customs prevailed. [85]

Having thus distributed and distinguished the several species of tenure in free-socage, I proceed next to show that this also partakes very strongly of the feodal nature. The tokens of their feodal original will evidently appear from a short **comparison of the incidents and consequences of socage tenure with those of tenure in chivalry.** [86]

1. In the first place, then, both were held of superior lords: one of the king, either immediately or as lord paramount, and (in the latter case) of a subject or mesne lord between the king and his tenant.

2. Both were subject to the feodal return, render, rent, or service of some sort or other, which arose from a supposition of an original grant from the lord to the tenant. In the military, or more proper feud, this was from its nature uncertain; in socage, which was a feud of the improper kind, it was certain, fixed, and determinate (though perhaps nothing more than bare fealty), and so continues to this day.

3. Both were, from their constitution, universally subject (over and above all other renders) to the oath of fealty, or mutual bond of obligation between the lord and tenant.

4. The tenure in socage was subject of common right to aids for knighting the son and marrying the eldest daughter. [87]

5. Relief is due upon socage tenure as well as upon tenure in chivalry, but the manner of taking it is very different. The relief on a knight's fee was 5*l.*, or one quarter of the supposed value of the land; but a scoage relief is one year's rent or render, payable by the tenant to the lord, be the same either great or small. Reliefs in knight-service were only payable if the heir at the death of his ancestor was of full age; but in socage they were due even though the heir was under age, because the lord has no wardship over him. The statute of Charles II. reserves the reliefs incident to socage tenures, and therefore, wherever lands in fee-simple are holden by a rent, relief is still due of common right upon the death of a tenant.

6. Primer seisin was incident to the king's socage tenants *in capite*,[2] as well as to those by knight-service. But tenancy *in capite* as well as primer seisins are, among the other feodal burthens, entirely abolished by the statute.

7. Wardship is also incident to tenure in socage, but of a nature very different from that incident to knight-service. For if the inheritance descend to an infant under fourteen, the wardship of him does not, nor ever did, belong to the lord of the fee, because in this tenure, no military or other personal service being required, there was no occasion for the lord to take the profits in order to provide a proper substitute for his infant tenant, but his nearest relation (to whom the inheritance cannot descend) shall be his guardian in socage, and have the custody of his land and body till he arrives at the age of fourteen. [88] At fourteen this wardship in socage ceases, and the heir may oust the guardian and

2. In chief.

call him to account for the rents and profits; for at this age the law supposes him capable of choosing a guardian for himself. But as the wardship ceased at fourteen, there was this disadvantage attending it, that young heirs, being left at so tender an age to choose their own guardians till twenty-one, might make an improvident choice. Therefore, when almost all the lands in the kingdom were turned into socage tenures, the same statute, 12 Car. II. c. 24, enacted that it should be in the power of any father by will to appoint a guardian till his child should attain the age of twenty-one; and if no such appointment be made, the court of chancery will frequently interpose and name a guardian, to prevent an infant heir from improvidently exposing himself to ruin.

8. Marriage, or the *valor maritagii*,[3] was not in socage tenure any perquisite or advantage to the guardian, but rather the reverse. For if the guardian married his ward under the age of fourteen, he was bound to account to the ward for the value of the marriage, even though he took nothing for it, unless he married him to advantage. At fourteen years of age the ward might have disposed of himself in marriage without any consent of his guardian, till the late act for preventing clandestine marriages. [89]

9. Fines for alienation were, I apprehend, due for lands holden of the king *in capite* by socage tenure, as well as in case of tenure by knight-service.

10. Escheats are equally incident to tenure in socage as they were to tenure by knight-service, except only in gavelkind lands, which are (as is before mentioned) subject to no escheats for felony, though they are to escheats for want of heirs.

Thus much for the two grand species of tenure, under which almost all the free lands of the kingdom were holden till the Restoration in 1660, when the former was abolished and sunk into the latter, so that the lands of both sorts are now holden *by one universal tenure of free and common socage.*

The other grand division of tenure, mentioned by Bracton, as cited in the preceding chapter, is that of **villenage**, as contradistinguished from *liberum tenementum,* or frank tenure. And this he subdivided into two classes, *pure* and *privileged* villenage; from whence have arisen two other species of our modern tenures.

III. From the tenure of pure villenage have sprung our present **copyhold** tenures, or tenure by copy of court roll at the will of the lord.[4]

3. Value of the marriage.

4. Not applicable to this country.

In order to obtain a clear idea of this tenure, it will be previously necessary to take a short view of the original and nature of manors.[90]

A manor, *manerium, a manendo*,[5] because the usual residence of the owner, seems to have been a district of ground held by lords or great personages, who kept in their own hands so much land as was necessary for the use of their families, which were called *terrae dominicales* or *demesne* lands, being occupied by the lord, or *dominus manerii*,[6] and his servants. The other, or *tenemental*, lands they distributed among their tenants, which, from the different modes of tenure, were distinguished by two different names. First, *book-land*, or charter-land, which was held by deed under certain rents and free-services, and in effect differed nothing from the free-socage lands; and from hence have arisen most of the free-hold tenants who hold of particular manors, and owe suit and service to the same. The other species was called *folk-land*, which was held by no assurance in writing, but distributed among the common folk or people at the pleasure of the lord and resumed at his discretion, being indeed land held in villenage, which we shall presently describe more at large. The residue of the manor, being uncultivated, was termed the lord's waste, and served for public roads and for common or pasture to the lord and his tenants. Manors were formerly called baronies, as they are still lordships, and each lord or baron was empowered to hold a domestic court, called the court-baron, for redressing misdemeanors and nuisances within the manor, and settling disputes of property among the tenants. This court is an inseparable ingredient of every manor, and if the number of suitors should so fail as not to leave sufficient to make a jury or homage, that is, two tenants at least, the manor itself is lost. [91]

In the early times of our legal constitution the king's greater barons, who had a large extent of territory held under the crown, granted out frequently smaller manors to inferior persons to be holden of themselves, which do therefore now continue to be held under a superior lord, who is called in such cases the lord paramount over all these manors, and his seignory is frequently termed an honor, not a manor, especially if it hath belonged to an ancient feodal baron, or hath been at any time in the hands of the crown. In imitation whereof, these inferior lords began to carve out and grant to others still more minute estates, to be held as of themselves, and were so proceeding downwards *in infinitum*,[7] till the superior lords observed that by this method of subinfeudation they lost all their feodal profits of wardships, marriages, and escheats, which fell into the hands of these mesne, or middle lords, who were the immediate superiors of the *terre-tenant*, or him who occupied the land; and also that the mesne lords themselves were so impoverished thereby, that they were disabled from performing their ser-

5. From remaining.
6. The lord of the manor.
7. In infinity.

vices to their own superiors. This occasioned, first, that provision in the thirty-second chapter of *Magna Carta*, 9 Hen. III. (which is not to be found in the first charter granted by that prince, nor in the Great Charter of King John), that no man should either give or sell his land without reserving sufficient to answer the demand of his lord, and afterwards **the statute of Westm. 3, or quia emptores,**[8] 18 Edw. 1, c. 1, which directs that, upon all sales or feoffments of land, the feoffee shall hold the same, not of his immediate feoffor, but of the chief lord of the fee, of whom such feoffor himself held it. But these provisions not extending to the king's own tenants *in capite*,[9] the like law concerning them is declared by the statutes of *prerogativa regis*,[1] 17 Edw. II. c. 6, and of 34 Edw. III. c. 15, by which last all subinfeudations previous to the reign of King Edward I. were confirmed, but all subsequent to that period were left open to the king's prerogative. [92] And from hence it is clear that all manors existing at this day must have existed as early as King Edward I., for it is essential to a manor that there be tenants who hold of the lord; and by the operation of these statutes no tenant *in capite* since the accession of that prince, and no tenant of a common lord since the statute of *quia emptores*, could create any new tenants to hold of himself.

Now with regard to the **folk-land, or estates held in villenage,** this was a species of tenure neither strictly feodal, Norman, or Sexon, but mixed and compounded of them all; and which also, on account of the heriots that usually attend it, may seem to have somewhat Danish in its composition. Under the Saxon government there were, as Sir William Temple speaks a sort of people in a condition of downright servitude, used and employed in the most servile works, and belonging, both they, their children and effects, to the lord of the soil, like the rest of the cattle or stock upon it. These seem to have been those who held what was called the folk-land, from which they were rmovable at the lord's pleasure. On the arrival of the Normans here, it seems not improbable that they who were strangers to any other than a feodal state might give some sparks of enfranchisement to such wretched persons as fell to their share by admitting them as well as others to the oath of fealty, which conferred a right of protection and raised the tenant to a kind of estate superior to downright slavery, but inferior to every other condition. This they called villenage and the tenants villeins, either from the word *vilis*, or else, as Sir Edward Coke tells us, *a villa*, because they lived chiefly in villages and were employed in rustic works of the most sordid kind, resembling the Spartan *helotes*, to whom alone the culture of the lands was consigned,—their rugged masters, like our northern ancestors, esteeming war the only honorable employment of mankind.

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8. Because purchasers.
9. In chief.
1. The king's prerogative.

These villeins, belonging principally to lords of manors, were either **villeins regardant,** that is, annexed to the manor or land, or else they were **in gross,** or at large, that is, annexed to the person of the lord and transferable by deed from one owner to another. [93] They could not leave their lord without his permission, but if they ran away or were purloined from him, might be claimed and recovered by action, like beasts or other chattels. They held, indeed, small portions of land by way of sustaining themselves and families, but it was at the mere will of the lord, who might dispossess them whenever he pleased; and it was upon villein services, that is, to carry out dung, to hedge and ditch the lord's demesnes, and any other the meanest offices. And their services were not only base, but uncertain both as to their time and quantity. A villein could acquire no property either in lands or goods, but, if he purchased either, the lord might enter upon them, oust the villein, and seize them to his own use, unless he contrived to dispose of them again before the lord had seized them, for the lord had then lost his opportunity.

In many places also a fine was payable to the lord if the villein presumed to marry his daughter to any one without leave from the lord, and, by the common law, the lord might also bring an action against the husband for damages in thus purloining his property. For the children of villeins were also in the same state of bondage with their parents, whence they were called in Latin *nativi,* which gave rise to the female appellation of a villein, who was called a *neife.* [94] In case of a marriage between a freeman and a neife, or a villein and a freewoman, the issue followed the condition of the father, being free if he was free, and villein if he was villein, contrary to the maxim of the civil law, that *partus sequitur ventrem.* But no bastard could be born a villein, because of another maxim in our law, he is *nullius filius;*[2] and as he can *gain* nothing by inheritance, it were hard that he should *lose* his natural freedom by it. The law, however, protected the persons of villeins, as the king's subjects, against atrocious injuries of the lord. For he might not kill or maim his villein, though he might beat him with impunity, since the villein had no action or remedy at law against his lord, but in case of the murder of his ancestor or the maim of his own person. Neifes, indeed, had also an appeal of rape in case the lord violated them by force.

Villeins might be enfranchised by manumission, which is either express or implied; express, as where a man granted to the villein a deed of manumission; implied, as where a man bound himself in a bond to his villein for a sum of money, granted him an annuity by deed, or gave him an estate in fee for life or years. For this was dealing with his villein on the footing of a freeman; it was in some of the instances giving him an action against his lord, and in others vesting in him an

2. The son of no one.

ownership entirely inconsistent with his former state of bondage. So also if the lord brought an action against his villein, this enfranchised him; for as the lord might have a short remedy against his villein by seizing his goods (which was more than equivalent to any damages he could recover), the law, which is always ready to catch at anything in favor of liberty, presumed that by bringing this action he meant to set his villein on the same footing with himself, and therefore held it an implied manumission. But in case the lord indicted him for felony it was otherwise, for the lord could not inflict a capital punishment on his villein without calling in the assistance of the law. [95]

Villeins by these and many other means in process of time gained considerable ground on their lords, and in particular strengthened the tenure of their estates to that degree that they came to have in them an interest in many places full as good, in others better than their lords. For the good-nature and benevolence of many lords of manors having time out of mind permitted their villeins and their children to enjoy their possessions without interruption in a regular course of descent, the common law, of which custom is the life, now gave them title to prescribe against their lords, and, on performance of the same services, to hold their lands in spite of any determination of the lord's will. For though in general they are still said to hold their estates at the will of the lord, yet it is such a will as is agreeable to the custom of the manor, which customs are preserved and evidenced by the rolls of the several courts baron in which they are entered, or kept on foot by the constant immemorial usage of the several manors in which the lands lie.

And as such tenants had nothing to show for their estates but these customs and admissions in pursuance of them entered on those rolls, or the copies of such entries witnessed by the steward, they now began to be called **tenants by copy of court-roll**, and their tenure itself a **copyhold.**

Thus copyhold tenures, although very meanly descended, yet come of an ancient house, for from what has been premised it appears that copyholders are in truth no other but villeins who, by a long series of immemorial encroachments on the lord, have at last established a customary right to those estates which before were held absolutely at the lord's will.[3]

Which affords a very substantial reason for the great variety of customs that prevail in different manors with regard both to the descent

3. Nothing of the sort in this country.

of the estates and the privileges belonging to the tenants. [96] And these encroachments grew to be so universal that when tenure in villenage was virtually abolished (though copyholds were reserved) by the statute of Charles II., there was hardly a pure villein left in the nation.

As a further consequence of what has been premised, we may collect these **two main principles**, which are held to be the supporters of the copyhold tenure, and without which it cannot exist: 1. That the lands be parcel of and situate within that manor under which it is held [97]; 2. That they have been demised, or demisable, by copy of court-roll immemorially. For immemorial custom is the life of all tenures by copy, so that no new copyhold can, strictly speaking, be granted at this day.

In some manors, where the custom hath been to permit the heir to succeed the ancestor in his tenure, the estates are styled copyholds of inheritance; in others, where the lords have been more vigilant to maintain their rights, they remain copyholds for life only. For the custom of the manor has in both cases so far superseded the will of the lord, that, provided the services be performed or stipulated for by fealty, he cannot, in the first instance, refuse to admit the heir of his tenant upon his death, nor, in the second, can he remove his present tenant so long as he lives, though he holds nominally by the precarious tenure of his lord's will.

The fruits and appendages of a copyhold tenure that it hath in common with free tenures, are fealty, services (as well in rents as otherwise), reliefs, and escheats. The two latter belong only to copyholds of inheritance, the former to those for life also. But besides these, copyholds have also heriots, wardship, and fines. **Heriots** are a render of the best beast or other good (as the custom may be) to the lord on the death of the tenant. These are incident to both species of copyhold, but wardship and fines to those of inheritance only. **Wardship,** in copyhold estates, partakes both of that in chivalry and that in socage. Like that in chivalry, the lord is the legal guardian, who usually assigns some relation of the infant tenant to act in his stead and he, like the guardian in socage, is accountable to his ward for the profits. [98] **Of fines,** some are in the nature of primer seisins due on the death of each tenant, others are mere fines for the alienation of the lands. In some manors only one of these sorts can be demanded, in some both, and in others neither. They are sometimes arbitrary and at the will of the lord, sometimes fixed by custom; but even when arbitrary, the courts of law, in favor of the liberty of copyholds, have tied them down to be *reasonable* in their extent.

Thus much for the ancient tenure of *pure* villenage, and the modern one of *copyhold at the will of the lord,* which is lineally descended from it.

IV. There is yet a fourth species of tenure, described by Bracton under the name sometimes of privileged villenage, and sometimes of *villein-socage*. This, he tells us, is such as has been held of the kings of England from the Conquest downwards, — that the tenants herein "*villana faciunt servitia, sed certa et determinata*,"[4] that they cannot aliene or transfer their tenements by grant or feoffment any more than pure villeins can, but must surrender them to the lord or his steward, to be again granted out and held in villenage. [99] And from these circumstances we may collect that what he here describes is no other than an exalted species of copyhold subsisting at this day, viz., the tenure in *ancient demesne,* to which, as partaking of the baseness of villenage in the nature of its services and the freedom of socage in their certainty, he has therefore given a name compounded out of both, and calls it *villanum socagium*.[5]

Ancient demesne consists of those lands or manors which, though now perhaps granted out to private subjects, were actually in the hands of the crown in the time of Edward the Confessor or William the Conqueror, and so appear to have been by the great survey in the exchequer called domesday-book. Lands holden by this tenure [ancient demesne] are therefore a species of copyhold, and as such preserved and exempted from the operation of the statute of Charles II. [100] Yet they differ from common copyholds, principally in the privileges before mentioned [*i. e.,* that their services were fixed and determinate, that they could not be compelled, like pure villeins, to relinquish their tenements at the lord's will or to hold them against their own, and that they had an interest equivalent to a freehold], as also they differ from freeholders by one especial mark and tincture of villenage, noted by Bracton and remaining to this day, viz., that they cannot be conveyed from man to man by the general common law conveyances of feoffment

4. They perform villein services, but certain and determined.

5. Villein socage.

and the rest, but must pass by surrender to the lord or his steward in the manner of common copyholds: yet with this distinction, that in the surrender of these lands in ancient demesne, it is not used to say, "*to hold at the will of the lord,*" in their copies, but only, "*to hold according to the custom of the manor.*" [101]

Upon the whole it appears that whatever changes and alterations tenures have in process of time undergone, from the Saxon era to 12 Car. II., all *lay* tenures are now in effect reduced to two species: *free* tenure in common socage, and *base* tenure by copy of court-roll.[6]

There is still one other species of tenure reserved by the statute of Charles II. which is of a *spiritual* nature, and called the tenure in frankalmoign.

V. **Tenure in frankalmoign,** *in libera eleemosyna* or free alms, is that whereby a religious corporation, aggregate or sole, holdeth lands of the donor to them and their successors forever. The service which they were bound to render for these lands was not certainly defined, but only in general to pray for the soul of the donor and his heirs, dead or alive; and therefore they did no fealty (which is incident to all other services but this), because this divine service was of a higher and more exalted nature. This is the tenure by which almost all the ancient monasteries and religious houses held their lands, and by which the parochial clergy and very many ecclesiastical and eleemosynary foundations hold them at this day, the nature of the service being upon the Reformation altered and made conformable to the purer doctrines of the Church of England. [102]

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6. As before stated (*ante*, *52, note), all lands in this country are allodial. Nevertheless a knowledge of the feudal system is necessary to understand the present terminology. Escheat seems to be the only real vestige of the system that is at present in active force and this has been largely modified by statutes. Consult the local statutes. See, also, 3 Kent Com., 513.

CHAPTER VII.

OF FREEHOLD ESTATES OF INHERITANCE.

An estate in lands, tenements, and hereditaments signifies such *interest* as the tenant has therein, so that if a man grants all *his estate* in Dale to A and his heirs, everything that he can possibly grant shall pass thereby.[1] [103]

First, with regard to the **quantity of interest** which the tenant has in the tenement, this is measured by its duration and extent. Thus, either his right of possession is to subsist for an uncertain period, during his own life or the life of another man, to determine at his own decease or to remain to his descendants after him; or it is circumscribed within a certain number of years, months, or days; or, lastly, it is infinite and unlimited, being vested in him and his representatives forever. And this occasions the primary division of estates into such as are *freehold* and such as are *less than freehold*. [104]

An estate of freehold, liberum tenementum, or frank-tenement, is such an estate in lands as is conveyed by livery of seisin, or in tenements of any incorporeal nature, by what is equivalent thereto.[2] And accordingly it is laid down by Littleton that where a freehold shall pass, it behooveth to have livery of seisin. As, therefore, estates of inheritance and estates for life could not by common law be conveyed without livery of seisin, these are properly estates of freehold, and as no other estates are conveyed with the same solemnity, therefore no others are properly freehold estates.

Estates of freehold (thus understood) are either estates of inheritance, or estates not of inheritance. The former

1. The word estate, does not denote the *quantum* (how much) of his property; but the extent and nature of his interest therein.

2. See *post*, *315. Livery of seisin is no longer necessary to pass a freehold; but, though no longer necessary, it still, in the absence of statutes changing the rule, serves to define estates of freehold as those in which livery of seisin was formerly necessary.

are again divided into inheritances *absolute,* or fee-simple, and inheritances *limited,* one species of which we usually call fee-tail.

I. **Tenant in fee-simple** (or, as he is frequently styled, tenant in fee) is he that hath lands, tenements, or hereditaments to hold to him and his heirs forever, generally, absolutely, and simply, without mentioning *what* heirs, but referring that to his own pleasure or to the disposition of the law. The true meaning of the word fee (*fœdum*) is the same with that of feud or fief, and in its original sense it is taken in contradistinction to *allodium;* which latter the writers on this subject define to be every man's own land which he possesseth merely in his own right, without owing any rent or service to any superior. [105] This is property in its highest degree, and the owner thereof hath *absolutum et directum dominium,*[3] and therefore is said to be seised thereof absolutely *in dominico suo,* in his own demesne. But *feodum,* or fee, is that which is held of some superior on condition of rendering him service, in which superior the ultimate property of the land resides. And therefore Sir Henry Spelman defines a feud or fee to be the right which the vassal or tenant hath in lands to *use* the same and take the profits thereof to him and his heirs, rendering to the lord his due services, the mere allodial *property* of the soil always remaining in the lord. This allodial property no subject in England has, it being a received, and now undeniable, principle in the law that all the lands in England are holden, mediately or immediately, of the king.

This is the primary sense and acceptation of the word *fee.* But the doctrine, "that all lands are holden," having been for so many ages a fixed and undeniable axiom, our English lawyers do very rarely (of late years especially) use the word *fee* in this its primary original sense, in contradistinction to *allodium;* or absolute property, with which they have no concern, but generally use it to express the continuance or quantity of estate. [106] **A fee, therefore, in**

3. Absolute and direct dominion.

general, signifies an estate of inheritance, being the highest and most extensive interest that a man can have in feud.[4] And when the term is used simply, without any other adjunct, or has the adjunct of *simple* annexed to it (as a fee, or a fee-simple), it is used in contradistinction to a fee conditional at the common law or a fee-tail by the statute, importing an absolute inheritance, clear of any condition, limitation, or restrictions to particular heirs, but descendible to the heirs general, whether male or female, lineal or collateral. And in no other sense than this is the king said to be seised in fee, he being the feudatory of no man.

Taking, therefore, *fee* for the future, unless where otherwise explained in this its secondary sense, as a state of inheritance, it is applicable to and may be had in any kind of hereditaments, either corporeal or incorporeal. But there is this distinction between the two species of hereditaments: that of a corporeal inheritance a man shall be said to be **seized in his demesne, as of fee**; of an incorporeal one, he shall only be said to be **seized as of fee** and not in his demense.

The fee-simple, or inheritance, of lands and tenements is generally vested and resides in some person or other, though divers inferior estates may be carved out of it. [107] **Yet sometimes the fee may be in abeyance,** that is (as the word signifies), in expectation, remembrance, and contemplation in law, there being no person in *esse*[5] in whom it can vest and abide, though the law considers it as always potentially existing, and ready to vest whenever a proper owner appears. Thus, in a grant to John for life, and afterwards to the heirs of Richard, the inheritance is plainly neither granted to John nor Richard, nor can it vest in the heirs of Richard till his death, *nam nemo est haeres viventis;*[6] it remains, therefore, in waiting or abeyance during the life of Richard.[7] This is likewise always the case of a parson

4. This term has still the same signification in American law.

5 In being.

6. For no one is heir of a living person.

7. "Where a remainder of inheritance is limited in *contingency* by way of use or by devise, the inheritance in the meantime, if not otherwise disposed of, remains in the grantor and

of a church who hath only an estate therein for the term of his life, and the inheritance remains in abeyance. And not only the fee, but the freehold also may be in abeyance, as, when a parson dies, the freehold of his glebe is in abeyance until a successor be named, and then it vests in the successor.[8]

The word "heirs" is necessary in the grant or donation, in order to make a fee or inheritance.[9] For if land be given to a man forever, or to him and his assigns forever, this vests in him but an estate for life.

This rule is now softened by many exceptions. [108]

For, 1, it does not extend to **devises by will**, in which a more liberal construction is allowed. And therefore by a devise to a man forever, or to one and his assigns forever, or to one in fee-simple, the devisee hath an estate of inheritance; for the **intention**[1] of the devisor is sufficiently plain from the words of perpetuity annexed, though he hath omitted the legal words of inheritance. But if the devise be to a man and his assigns, without annexing words of perpetuity, there the devise shall take only an estate for

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his heirs, or in the heirs of the testator, until the contingency happens to take it out of them." *Fearne, Cont. Rem.*, 513, 4th Ed. The above example, therefore, is a contingent remainder, considered farther on. See, also, 1 Bouvier Law Dict., Abeyance.

8. There hardly seems any necessity to resort to abeyance, or *to the clouds*, to explain the residence of the inheritance, or of the freehold. In the first case, the whole fee-simple is conveyed to a sole corporation, the parson and his successors; but if any interest is not conveyed, it still remains in the grantor and his heirs, to whom, upon the dissolution of the corporation, the estate will revert. See 1 book, 484. And in the second case, the freehold seems, in fact, from the moment of the death of the parson, to rest and abide in the successor, who is brought into view and notice by the institution and induction; for after induction he can recover all the rights of the church, which accrued from the death of the predecessor.

9. Still the rule in deeds of conveyance in this country, unless changed by statute. Consult the local statutes. See 44 & 45 Vict., ch. 41, sec. 63.

1. In wills the intention of the testator shall prevail, and the general intention controls the particular intention if there is an irreconcilable conflict between them. See Schouler on Wills (1910), 230, 231 and cases cited; Gardner on Wills (1903), 368 and cases cited.

life, for it does not appear that the devisor intended any more. 2. Neither does this rule extend to **fines or recoveries**[2] considered as a species of conveyance; for thereby an estate in fee passes by act and operation of law without the word "heirs," as it does also, for particular reasons, by certain other methods of conveyance, which have relation to a former grant or estate, wherein the word "heirs" was expressed. 3. **In creations of nobility by writ,** the peer so created hath an inheritance in his title, without expressing the word "heirs;" for heirship is implied in the creation, unless it be otherwise specially provided. But in creations by patent, which *stricti juris,* the word "heirs" must be inserted, otherwise there is no inheritance. 4. **In grants of lands to sole corporations and their successors,** the word "successors" supplies the place of "heirs;"[3] for as heirs take from the ancestor, so doth the successor from the predecessor. But in a grant of lands to a corporation aggregate, the word "successors" is not necessary, though usually inserted; for albeit such simple grant be strictly only an estate for life, yet as that corporation never dies, such estate for life is perpetual, or equivalent to a fee-simple, and therefore the law allows it to be one. [109] 5. Lastly, **in the case of the king,** a fee-simple will vest in him without the word "heirs" or "successors" in the grant, partly from prerogative royal, and partly from a reason similar to the last, because the king in judgment of law never dies.

II. We are next to consider **limited fees,** or such estates of inheritance as are clogged and confined with conditions or qualifications of any sort. And these we may divide into two sorts: 1. *Qualified* or *base* fees; and 2. Fees *conditional,* so called at the common law, and afterwards fees-*tail,* in consequence of the statute *de donis.*

1. **A base or qualified fee** is such a one as hath a qualification subjoined thereto, and which must be determined whenever the qualification annexed to it is at an end.[4] As,

2. No longer in use in this country. See *post.*

3. "Successors and assigns" are words commonly used.

4. "A base or determinable fee is a fee-simple, which may be terminated by the happening of a contingency." "The most usual cases [says Mr.

in the case of a grant to A and his heirs, *tenants of the manor of Dale,* in this instance, whenever the heirs of A cease to be tenants of that manor, the grant is entirely defeated.

2. **A conditional fee at the common law** was a fee restrained to some particular heirs, exclusive of others: as to the heirs *of a man's body,* by which only his lineal descendants were admitted, in exclusion of collateral heirs; or to the heirs *male of his body,* in exclusion both of collaterals and lineal females also. [110]

Now with regard to the condition annexed to these fees by the common law, our ancestors held that such a gift (to a man and the heirs of his body) was a gift upon condition that it should revert to the donor if the donee had no heirs of his body, but if he had, it should then remain to the donee. They therefore called it a fee-simple, on condition that he had issue. Now we must observe that when any condition is performed, it is thenceforth entirely gone, and the thing to which it was before annexed becomes absolute, and wholly unconditional. [111] So that as soon as the grantee had any issue born, his estate was supposed to become absolute by the performance of the condition, at least for these three purposes: 1. To enable the tenant to aliene the land, and thereby to bar not only his own issue, but also the donor of his interest in the reversion. 2. To subject him to forfeit it for treason, which he could not do till issue born, longer than for his own life, lest thereby inheritance of the issue and reversion of the donor might have been defeated. 3. To empower him to charge the land with rents, commons, and certain other incumbrances, so as to bind his issue. However, if the tenant did not in fact aliene the land, the course of descent was not altered by this performance of the condition; for if the issue had afterwards died, and then the tenant, or original grantee, had died without making any alienation, the land by the terms of the

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Hopkins] at the present time are where land is granted for a specified use, to revert to the grantor when that use ceases." See Hopkins, Real Prop., 178 and cases cited in notes.

donation could descend to none but the heirs *of his body,* and therefore, in default of them, must have reverted to the donor. For which reason, in order to subject the lands to the ordinary course of descent, the donees of these conditional fee-simples took care to aliene as soon as they had performed the condition by having issue, and afterwards re-purchased the lands, which gave them a fee-simple absolute that would descend to the heirs general, according to the course of the common law.

The nobility, who were willing to perpetuate their possessions in their own families, to put a stop to this practice procured the statute of Westminster the second (commonly called the **statute de donis conditionalibus**)[5] to be made, which revived in some sort the ancient feodal restraints which were originally laid on alienations, by enacting that from thenceforth the will of the donor be observed, and that the tenements so given (to a man and the heirs of his body) should at all events go to the issue, if there were any, or, if none, should revert to the donor. [112]

Upon the construction of this act parliament, the judges determined that the donee had no longer a conditional fee-simple which became absolute and at his own disposal the instant any issue was born, but they divided the estate into two parts, leaving in the donee a new kind of particular estate which they denominated **a fee-tail**, and investing in the donor the ultimate fee-simple of the land expectant on the failure of issue, which expectant estate is what we now call a reversion.

Having thus shown the *original* of estates-tail, I now proceed to consider **what things may, or may not, be entailed under the statute de donis.** [113] *Tenements* is the only word used in the statute, and this Sir Edward Coke expounds to comprehend all corporeal hereditaments whatsover, and also all incorporeal hereditaments which savor of the realty, that is, which issue out of corporeal ones, or which concern, or are annexed to, or may be exercised within the same, as rents, estovers, commons, and the like.

5. Concerning conditional gifts.

Also offices and dignities which concern lands, or have relation to fixed and certain places, may be entailed. But mere personal chattels which savor not at all of the realty cannot be entailed. Neither can an office which merely relates to such personal chattels, nor an annuity, which charges only the person, and not the lands of the grantor. But in these last, if granted to a man and the heirs of his body, the grantee hath still a fee-conditional at common law, as before the statute, and by his alienation (after issue born) may bar the heir or reversioner. An estate to a man and his heirs for another's life cannot be entailed, for this is strictly no estate of inheritance (as will appear hereafter), and therefore not within the statute *de donis*. Neither can a copyhold estate be entailed by virtue of the *statute*, for that would tend to encroach upon and restrain the will of the lord; but by the *special custom* of the manor a copyhold may be limited to the heirs of the body, for here the custom ascertains and interprets the lord's will.

Next, **as to the several species of estates-tail**, and how they are respectively created. Estates-tail are either *general* or *special*. **Tail general** is where lands and tenements are given to one, and the *heirs of his body begotten*. **Tenant in tail special** is where the gift is restrained to certain heirs of the donee's body, and does not go to all of them in general. And this may happen several ways. [114] I shall instance in only one, as where lands and tenements are given to a man and the *heirs of his body, on Mary his now wife to be begotten*. Here no issue can inherit, but such special issue as is engendered between them two, not such as the husband may have by another wife; and therefore it is called special tail.

Estates in general and special tail may either be in **tail male** or **tail female**. As if lands be given to a man and his *heirs male of his body begotten*, this is an estate in tail male general; but if to a man and the heirs *female of his body on his present wife begotten*, this is an estate tail female special. And in case of an entail mail, the heirs female shall never inherit, nor any derived from them; nor, *e converso*, the heirs male, in case of a gift in tail female.

As the word *heirs* is necessary to create a fee, so in further limitation of the strictness of the feodal donation, **the word "body," or some other words of procreation, are necessary to make it a fee-tail,** and ascertain to what heirs in particular the fee is limited. If, therefore, either the words of inheritance or words of procreation be omitted, albeit the others are inserted in the grant, this will not make an estate-tail. [115] In last wills and testaments, wherein greater indulgence is allowed, an estate-tail may be created by a devise to a man and his *seed*, or to a man and his *heirs male*, or by other irregular modes of expression.

There is still another species of entailed estates, now indeed grown out of use, yet still capable of subsisting in law, which are estates *libero maritagio*, or **frankmarriage.** These are defined to be where tenements are given by one man to another, together with a wife, who is the daughter or cousin of the donor, to hold in frankmarriage. Now by such gift, though nothing but the word *frankmarriage* is expressed, the donees shall have the tenements to them and the heirs of their two bodies begotten, that is, they are tenants in special tail.

The incidents to a tenancy in tail, under the statute Westm. 2, are chiefly these: 1. That a tenant in tail may commit *waste* on the estate-tail by felling timber, pulling down houses, or the like, without being impeached or called to account for the same; 2. That the wife of the tenant in tail shall have her *dower*, or thirds, of the estate-tail [116]; 3. That the husband of a female tenant in tail may be tenant by the *curtesy* of the estate-tail; 4. That an estate-tail may be *barred* or destroyed by a fine, by a common recovery, or by lineal warranty descending with assets to the heir.

About two hundred years intervened between the making of the statute *de donis* [1285] and the application of **common recoveries** to this intent [to evade the statute], in the twelfth year of Edward IV. [1473], which were then openly declared by the judges te be a sufficient bar of an estate-tail. [117]

This expedient having greatly abridged estates-tail with regard to their duration, others were soon invented to strip them of other privileges. The next that was attacked was

their freedom from **forfeitures for treason** [stat. 26 Hen. VIII. c. 13].

The next attack which they suffered in order of time was by the statute 32 Hen. VIII. c. 28, whereby certain **leases made by tenants in tail,** which do not tend to the prejudice of the issue, were allowed to be good in law and to bind the issue in tail. [118] But they received a more violent blow, in the same session of parliament, by the construction put upon the statute of fines by the statute 32 Hen. VIII. c. 36, which declares a **fine** duly levied by tenant in tail to be a complete bar to him and his heirs, and all other persons claiming under such entail.

Lastly, by a statute of the succeeding year [33 Hen. VIII. c. 39, § 75] all estates-tail are rendered liable to be **charged for payment of debts due to the king by record or special contract,** as since, by the bankrupt laws, they are also subjected to be sold for the debts contracted by a bankrupt. And by the construction put on the statute 43 Eliz. c. 4, an appointment by tenant in tail of the lands entailed to a charitable use is good without fine or recovery.

Estates-tail, being thus by degrees unfettered, are now reduced again to almost the same state, even before issue born, as conditional fees were in at common law after the condition was performed by the birth of issue.[6] For, first, the tenant in tail is now enabled to aliene his lands and tenements by fine, by recovery, or by certain other means, and thereby to defeat the interest as well of his own issue, though unborn, as also of the reversioner, except in the case of the crown; secondly, he is now liable to forfeit them for high treason; and lastly, he may charge them with reasonable leases, and also with such of his debts as are due to the crown on specialties, or have been contracted with his fellow-subjects in a course of extensive commerce.

6. In this country in many states estates-tail have been abolished by statutes which have either converted them with estates in fee-simple, or life estates with remainder to the donee's heirs who would take under the entail. In some states they still exist but may be barred by deed. See, generaly, Hopkins, Real Prop., ch. 4, and especially pages 52, 53 and notes. See Rev. Stat. Ill., ch. 30, sec. 6; Cooper v. Cooper, 76 Ill. 57.

CHAPTER VIII.

OF FREEHOLDS NOT OF INHERITANCE.

Of estates for life, some are **conventional**, or expressly created by the act of the parties; others merely **legal**, or created by construction and operation of law. We will consider them both in their order. [120]

I. **Estates for life**, expressly created by deed or grant (which alone are properly conventional), are where a lease is made of lands or tenements to a man to hold for the term of his own life or for that of any other person, or for more lives than one, in any of which cases he is styled tenant for life; only when he holds the estate by the life of another he is usually called tenant *per auter vie.*[1] They are given or conferred by the same feodal rights and solemnities, the same investiture or livery of seisin, as fees themselves are, and they are held by fealty if demanded, and such conventional rents and services as the lord, or lessor, and his tenant, or lessee, have agreed on.

Estates for life may be created not only by the express words before mentioned, but also by a general grant, without defining or limiting any specific estate. [121] As, if one grants to A B the manor of Dale, this makes him tenant for life. Also such a grant at large, or a grant for a term of life generally, shall be construed to be an estate for the life *of the grantee,* in case the grantor hath authority to make such grant. For an estate for a man's own life is more beneficial and of a higher nature than for any other life, and the rule of law is that **all grants are to be taken most strongly against the grantor,**[2] unless in the case of the king.

There are some estates for life which may determine upon future contingencies before the life for which they are created expires; as if an estate be granted to a woman dur-

1. For another life. See Broom's Legal Maxims, *529; Co. Litt., 36a.

2. This is an important rule of law.

ing her widowhood, or to a man until he be promoted to a benefice. In these and similar cases, whenever the contingency happens, when the widow marries or when the grantee obtains a benefice, the respective estates are absolutely determined and gone. Yet while they subsist they are reckoned estates for life, because, the time for which they will endure being uncertain, they may by possibility last for life, if the contingencies upon which they are to determine do not sooner happen.

And moreover, in case an estate be granted to a man for his life, generally it may also determine by his *civil* death, as if he enters into a monastery, whereby he is dead in law; for which reason in conveyances the grant is usually made "for the term of a man's *natural* life," which can only determine by his *natural* death.

The incidents to an estate for life are principally the following, which are applicable not only to that species of tenants for life which are expressly created by deed, but also to those which are created by act and operation of law. [122]

1. **Every tenant for life, unless restrained by covenant or agreement, may of common right take upon the land demised to him reasonable estovers or botes.** For he hath a right to the full enjoyment and use of the land and all its profits during his estate therein.[3] But he is not permitted to cut down timber, or to do other waste upon the premises, for the destruction of such things as are not the temporary profits of the tenement is not necessary for the tenant's complete enjoyment of his estate, but tends to the permanent and lasting loss of the person entitled to the inheritance.[4]

3. Hopkins, Real Prop., 61 and cases cited.

4. Waste is a permanent and material injury to the reversionary interest. The English rules as to waste are, owing to the difference in circumstances, to a large extent inapplicable to this country, especially those relating to cutting down trees and the use of land, and what would be waste in a thickly settled eastern state might not be in a new and undeveloped region. Hopkins, Real Prop., 62-67 and cases cited.

2. **Tenant for life, or his representatives, shall not be prejudiced by any sudden determination of his estate,** because such a determination is contingent and uncertain. Therefore if a tenant for his own life sows the lands and dies before harvest, his executors shall have the **emblements or profits of the crop**; for the estate was determined by the *act of God,* and it is a maxim in the law that *actus Dei nemini facit injuriam.*[5] So it is also if a man be tenant for the life of another, and *cestuy que vie,* or he on whose life the land is held, dies after the corn sown, the tenant *per auter vie*[6] shall have the emblements. [123] The same is also the rule if a life-estate be determined by the *act of law.*[7] Therefore if a lease be made to husband and wife during coverture (which gives them a determinable estate for life), and the husband sows the land, and afterwards they are divorced *a vinculo matrimonii*[8] [decree of nullity], the husband shall have the emblement in this case, for the sentence of divorce is the act of law. But if an estate for life be determined by the tenant's *own act* (as by forfeiture for waste committed, or if a tenant during widowhood thinks proper to marry), in these and similar cases, the tenants, having thus determined the estate by their own acts, shall not be entitled to take the emblements. The doctrine of emblements extends not only to corn sown, but to roots planted, or other annual artificial profit; but it is otherwise of fruit-trees, grass, and the like, which are not planted annually at the expense and labor of the tenant, but are either a permanent or natural profit of the earth.[9]

3. **A third incident to estates for life relates to the under-tenants or lessees**; for they have the same, nay greater indulgences than the lessors, the original tenants for life. The same, for the law of estovers and emblements with regard to the tenant for life is also law with regard to his under-tenant, who represents him and stands in his place;

5. The act of God works wrong to no one.

6. For another life.

7. See Hopkins, Real Prop., 61 and notes; Ewell on Fixtures (2d Ed.), ch. 8, where the cases are fully collected.

8. From the bond of matrimony.

9. See note, *supra.*

and greater, for in those cases where tenant for life shall not have the emblements, because the estate determines by his own act, the exception shall not reach his lessee, who is a third person. [124] As in the case of a woman who holds *durante viduitate;*[1] her taking husband is her own act, and therefore deprives her of the emblements; but if she leases her estate to an under-tenant, who sows the land, and she then marries, this her act shall not deprive the tenant of his emblements, who is a stranger and could not prevent her.[2] The lessees of tenants for life had also at the common law another most unreasonable advantage, for at the death of their lessors, the tenants for life, these under-tenants might if they pleased quit the premises, and pay no rent to anybody for the occupation of the land since the last quarter-day or other day assigned for payment of rent. To remedy which it is now enacted that the executors or administrators of tenant for life, on whose death any lease determined, shall recover of the lessee a ratable proportion of rent from the last day of payment to the death of such lessor.[3]

II. The next estate for life is of the legal kind, as contradistinguished from conventional, viz., that of **tenant in tail after possibility of issue extinct.** This happens where one is tenant in special tail, and a person, from whose body the issue was to spring, dies without issue, or, having left issue, that issue becomes extinct. In either of these cases the surviving tenant in special tail becomes tenant in tail after possibility of issue extinct. This estate must be created by the act of God, that is, by the death of that person out of whose body the issue was to spring, for no limitation, conveyance, or other human act can make it. [125] For, if land be given to a man and his wife and the heirs of their two bodies begotten, and they are divorced *a vinculo matrimonii,* they shall neither of them have this estate, but be barely tenants for life, notwithstanding the inheritance once vested in them. A possibility of issue is always supposed

1. During widowhood.
2. See note, *supra.*
3. Consult the local statutes.

to exist in law, unless extinguished by the death of the parties, even though the donees be each of them an hundred years old.

This estate is of an amphibious nature, partaking partly of an estate-tail and partly of an estate for life. **The tenant is, in truth, only tenant for life, but with many of the privileges of a tenant in tail,**[4] as not to be punishable for waste, &c.; or he is tenant in tail with many of the restrictions of a tenant for life, as to forfeit his estate if he alienes it in fee-simple. Whereas such alienation by tenant in tail, though voidable by the issue, is no forfeiture of the estate to the reversioner, who is not concerned in interest till all possibility of issue be extinct. [126] But in general the law looks upon this estate as equivalent to an estate for life only, and as such will permit this tenant to exchange his estate with a tenant for life, which exchange can only be made, as we shall see hereafter, of estates that are equal in their nature.

III. **Tenant by the curtesy of England** is where a man marries a woman seised of an estate of inheritance, that is, of lands and tenements in fee-simple or fee-tail, and has by her issue, born alive, which was capable of inheriting her estate. In this case he shall, on the death of his wife, hold the lands for his life as tenant by the curtesy of England. As soon as any child was born, the father began to have a permanent interest in the lands, he became one of the *pares curtis*,[5] did homage to the lord, and was called **tenant by the curtesy initiate**, and this estate being once vested in him by the birth of the child, was not suffered to determine by the subsequent death or coming of age of the infant. [127]

There are four requisites necessary to make a tenancy by the curtesy: marriage, seisin of the wife, issue, and death of the wife. 1. The **marriage** must be canonical and legal. 2. The **seisin** of the wife must be an actual seisin or possession of the lands, not a bare right to possess, which is a seisin in law, but an actual possession, which is a seisin in deed. And therefore a man shall not be tenant by the cur-

4. See *ante*, *118, note.

5. Peers of the court.

tesy of a remainder or reversion. But of some incorporeal hereditaments a man may be tenant by the curtesy, though there have been no actual seisin of the wife, as in case of an advowson, where the church has not become void in the lifetime of the wife, which a man may hold by the curtesy, because it is impossible ever to have actual seisin of it, and *impotentia excusat legem*. If the wife be an idiot, the husband shall not be tenant by the curtesy of her lands. 3. There must be **issue born alive** during the life of the mother,[6] and capable of inheriting the mother's estate. [128] The time when the issue was born is immaterial, provided it were during the coverture, for, whether it were before or after the wife's seisin of the lands, whether it be living or dead at the time of the seisin or at the time of the wife's decease, the husband shall be tenant by the curtesy. The husband by the birth of the child becomes (as was before observed) **tenant by the curtesy initiate**, and may do many acts to charge the lands, but his estate is **not consummate till the death of the wife**, which is the fourth and last requisite to make a complete tenant by the curtesy.[7]

IV. **Tenant in dower** is where the husband of a woman is seised of an estate of inheritance and dies. In this case the wife shall have the third part of all the lands and tenements whereof he was seised at any time during the coverture, to hold to herself for the term of her natural life. [129]

1. **Who may be endowed.** [130] She must be the actual wife of the party at the time of his decease. If she be divorced *a vinculo matrimonii*,[8] she shall not be endowed.

6. It will not be sufficient, it is stated, if the mother die in childbirth and the child is afterwards delivered by Caesarean section. Hopkins, Real Prop., 74, citing Co. Litt., 296; Marsellis v. Thalhimer, 2 Paige (N. Y.), 42.

7. In many of the states curtesy has been abolished by statute or dower substitute therefor; in others it exists as at common law. The text is regarded as a correct statement of the common law upon the subject. See, generally, Hopkins, Real Prop., 73-83 and notes, where a large number of cases are collected. Consult local statutes. In Illinois the husband has a statutory dower and no curtesy. Rev. Stat. Ill., ch. 41, sec. 1.

8. From the bond of marriage. In Blackstone's time a decree *a vinculo* rendered the marriage void from the

But a divorce *a mensa et thoro*[9] only doth not destroy the dower, no, not even for adultery itself, by the common law. Yet now by the statute Westm. 2,[1] if a woman voluntarily leaves (which the law calls eloping from) her husband, and lives with an adulterer, she shall lose her dower, unless her husband be voluntarily reconciled to her. It was formerly held that the wife of an idiot might be endowed, though the husband of an idiot could not be tenant by the curtesy; but as it seems to be at present agreed, upon principles of sound sense and reason, that an idiot cannot marry, being incapable of consenting to any contract, this doctrine cannot now take place.[2] By the ancient law the wife of a person attainted of treason or felony could not be endowed. An alien also cannot be endowed[3] unless she be queen consort, for no alien is capable of holding land. [131] The wife must be above nine years old at her husband's death, otherwise she shall not be endowed.

2. Next, **of what may a wife be endowed.** She is now by law entitled to be endowed of all lands and tenements of which her husband was seised in fee-simple or fee-tail at any time during the coverture, and of which any issue which she might have had might by possibility have been heir.[4] Therefore, if a man seised in fee-simple hath a son by his first wife, and after marries a second wife, she shall be

beginning and was equivalent to our decree of nullity. Under the general American law (except in South Carolina), divorces *a vinculo* are granted for adultery, desertion and other causes arising after the marriage, and do not avoid it *ab initio* but only from the time of the decree which does not necessarily, where she is free from fault, bar her dower, as does a decree of nullity. In some states, however, a decree *a vinculo* for causes arising after the marriage, bars her dower; in others it does not. See the local statutes and the cases collected in Hopkins' Real Estate, 104, notes.

9. From bed and board. This sort of a divorce is merely a judicial separation and does not avoid the marriage.

1. Re-enacted or recognized in some of the states. Hopkins, Real Prop., 103 and notes. Consult local statutes.

2. If the idiocy or insanity avoids the marriage *ab initio*, of course, dower fails with it; but if the marriage is merely voidable, the case is otherwise.

3. Changed by statute in some states. Hopkins, Real Prop., 103, notes.

4. Hopkins, Real Prop., 83-93. There is no dower in an estate of joint tenancy. Id., 92.

endowed of his lands, for her issue might by possibility have been heir on the death of the son by the former wife. But if there be a donee in special tail who holds lands to him and the heirs of his body begotten on Jane his wife, though Jane may be endowed of these lands, yet if Jane dies and he marries a second wife, that second wife shall never be endowed of the lands entailed, for no issue that she could have could by any possibility inherit them. A seisin in law of the husband will be as effectual as a seisin in deed in order to render the wife dowable, for it is not in the wife's power to bring the husband's title to an actual seisin, as it is in the husband's power to do with regard to the wife's lands,— which is one reason why he shall not be tenant by the curtesy but of such lands whereof the wife, or he himself in her right, was actually seised in deed. The seisin of the husband, for a *transitory instant only,* when the same act which gives him the estate conveys it also out of him again, — as where, by a fine, land is granted to a man, and he immediately renders it back by the same fine, — such a seisin will not entitle the wife to dower; for the land was merely *in transitu,*[5] and never rested in the husband, the grant and render being one continued act. [132] But if the land abides in him [beneficially] for the interval of but a *single moment,* it seems that the wife shall be endowed thereof. And, in short, a widow may be endowed of all her husband's lands, tenements, and hereditaments, corporeal or incorporeal [such as savor of the realty], under the restrictions before mentioned, unless there be some special reason to the contrary. Copyhold estates are also not liable to dower, being only estates at the lord's will, unless by the special custom of the manor, in which case it is usually called the widow's free bench. But where dower is allowable, it matters not though the husband aliene the lands during the coverture, for he alienes them liable to dower.

3. Next, **as to the manner in which a woman is to be endowed.** There are now subsisting four species of dower:

5. In passage. Such is the case of a conveyance of land and a mortgage back to the grantor to secure unpaid purchase money.

1. Dower by the common law [and by statute in the United States], or that which is before described.

2. Dower by particular custom, as that the wife should have half the husband's lands, or in some places the whole, and in some only a quarter. 3. **Dower ad ostium ecclesiae** [obsolete], which is where tenant in fee-simple of full age, openly at the church door, where all marriages were formerly celebrated, after affiance made, and (Sir Edward Coke in his translation of Littleton, adds) troth plighted between them, doth endow the wife with the whole, or such quantity as he shall please, of his lands, at the same time specifying and ascertaining the same, on which the wife, after her husband's death, may enter without further ceremony. [133] 4. **Dower ex assensu patris** [obsolete], which is only a species of dower *ad ostium ecclesiae*, made when the husband's father is alive, and the son by his consent, expressly given, endows his wife with parcel of his father's lands.

I proceed to consider **the method of endowment, or assigning dower, by the common law,** which is now the only usual species. [135] It was provided, first by the charter of Henry I., and afterwards by *Magna Carta*, that the widow shall pay nothing for her marriage, nor shall be distrained to marry afresh if she chooses to live without a husband, but shall not, however, marry against the consent of the lord; and further, that nothing shall be taken for assignment of the widow's dower, but that she shall remain in her husband's capital mansion-house for forty days after his death, during which time her dower shall be assigned. These forty days are called **the widow's quarantine,**[6] a term made use of in law to signify the number of forty days, whether applied to this occasion or any other. **The particular lands to be held in dower must be assigned by the heir of the husband or his guardian,**[7] not only for the sake of notoriety, but also to entitle the lord of the fee to demand his services of the heir, in respect of the lands so holden. For the heir by this entry becomes tenant thereof to the lord, and the widow is immediate tenant to the heir by a kind of subinfeudation, or under-tenancy, completed by this

6. Extended and modified by statute in some of the states. See local statutes, also Hopkins, Real Prop., 94 and notes.

7. See, however, Bonner v. Peterson, 44 Ill. 260. See Hopkins, Real Prop., 99.

investiture or assignment, which tenure may still be created, notwithstanding the statute of *quia emptores*,[8] because the heir parts not with the fee-simple, but only with an estate for life. [136] If the heir or his guardian do not assign her dower within the term of quarantine, or do assign it unfairly, she has her **remedy at law**, and the sheriff is appointed to assign it. Or if the heir (being under age) or his guardian assign more than she ought to have, it may be afterwards remedied by a writ of *admeasurement* of dower.[9] **If the thing of which she is endowed be devisible**, her dower must be set out by metes and bounds;[1] but **if it be indivisible**, she must be endowed specially, as of the third presentation to a church, the third toll-dish of a mill, the third part of the profits of an office, the third sheaf of tithe, and the like.[2]

4. **How dower may be barred or prevented.** [Regulated by statute in this country.][3] A widow may be barred of her dower, not only by elopement, divorce, being an alien, the treason of her husband, and other disabilities before mentioned, but also by detaining the title-deeds or evidences of the estate from the heir until she restores them.[4] And by the statute of Gloucester, if a dowager alienes the land assigned her for dower, she forfeits it *ipso facto*,[5] and the heir may recover it by action. [Here she may aliene for her own life.] [137] A woman also may be barred of her dower by levying a fine or suffering a recovery of the lands during her coverture. But the most usual method of barring dowers is by jointures, as regulated by the statute, 27 Hen. VIII. c. 10.

A jointure, which, strictly speaking, signifies a joint estate limited to both husband and wife, but in common

8. Because purchaser.

9. The remedies for the recovery of dower vary in the several states according to the local practice. Hopkins, Real Prop., 100.

1. Hopkins, Real Prop., 98.

2. When such division is impossible or impracticable, the land is sold and the proceeds divided. Hopkins, Real Prop., 98.

3. See *ante*, notes.

4. As title deeds are recorded in this country, this is not applicable here.

5. In very fact.

acceptation extends also a sole estate limited to the wife only, is thus defined by Sir Edward Coke: "A competent livelihood of freehold for the wife, of lands and tenements to take effect, in profit or possession presently after the death of the husband, for the life of the wife at least." [Regulated by statute here.] But then these four requisites must be punctually observed: 1. The jointure must take effect immediately on the death of the husband. [138] 2. It must be for her own life at least, and not *pur auter vie*,[6] for any term of years, or other smaller estate. 3. It must be made to herself, and no other in trust for her. 4. It must be made, and so in the deed particularly expressed to be in satisfaction of her whole dower, and not of any particular part of it. If the jointure be made to her *after* marriage, she has her election after her husband's death, as in dower *ad ostium ecclesiae*,[7] and may either accept it or refuse it, and betake herself to her dower at common law, for she was not capable of consenting to it during coverture. And if, by any fraud or accident, a jointure made before marriage proves to be on a bad title, and the jointress is evicted or turned out of possession, she shall then (by the provisions of the same statute) have her dower *pro tanto*[8] at the common law.[9]

A widow may enter at once, without any formal process, on her jointure land, as she also might have done on dower *ad ostium ecclesiae*, which a jointure in many points resembles. And the resemblance was still greater while that species of dower continued in its primitive state; whereas no small trouble, and a very tedious method of proceeding, is necessary to compel a legal assignment of dower. [139] And, what is more, though dower be forfeited by the treason of the husband, yet lands settled in jointure remain unimpeached to the widow.

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6. For the life of another.

7. At the door of the church.

8. For so much.

9. With us dower may be barred by jointure in lieu of dower and by a testamentary provision in lieu of dower. See Hopkins, Real Prop., 107, 109. But the most common method is by joining with her husband in the execution of a conveyance of the land and acknowledging the same in accordance with local statutes. See the local statutes, also Hopkins, Real Prop., 105-108.

CHAPTER IX.

OF ESTATES LESS THAN FREEHOLD.

Of estates that are less than freehold there are three sorts: 1. Estates for years; 2. Estates at will; 3. Estates by sufferance.[1]

I. **An estate for years** is a contract for the possession of lands or tenements for some determinate period, and it takes place where a man letteth them to another for the term of a certain number of years agreed upon between the lessor and the lessee, and the lessee enters thereon.[2] If the lease be but for half a year or a quarter, or any less time, this lessee is respected as a tenant for years, and is styled so in some legal proceedings, a year being the shortest term which the law in this case takes notice of. And this may not improperly lead us into a short digression concerning **the division and calculation of time by the English law.**

The space of a year is a determinate and well-known period, consisting commonly of 365 days; for though in bissextile, or leap-years, it consists properly of 366, yet by the *statute* 21 Hen. III. the increasing day in the leap-year, together with the preceding day, shall be accounted for one day only. [141]

That of **a month** is more ambiguous, there being in common use two ways of calculating months, either as **lunar,** — consisting of twenty-eight days, the supposed revolution of the moon, thirteen of which make a year, — or as **cal-**

1. The law of Landlord and Tenant is too voluminous to be summarized in a note. For detail beyond the text, see Wood on Landlord and Tenant (1882), 2 vols.; Taylor on Landlord and Tenant (1909), 2 vols.; McAdam on Landlord and Tenant (1910), 4 vols.; Tiffany on Landlord and Tenant (1909), 2 vols.; Underhill on Landlord and Tenant (1909), 2 vols.; Woodfall's Landlord and Tenant (1900), 2 vols. See, also, Ewell on Fixtures (2d Ed., 1905), ch. 4; Washburn on Real Property.

2. As to the effect of the Statute of Frauds in requiring the lease to be in writing, see *post.*

endar months of unequal lengths, according to the Julian division in our common almanacs, commencing at the calends of each month, whereof in a year there are only twelve. **A month in law is a lunar month, or twenty-eight days, unless otherwise expressed.** Therefore a lease for "twelve months" is only for forty-eight weeks; but if it be for "*a* twelvemonth" in the singular number, it is good for the whole year.[3]

In the space of a day all the twenty-four hours are usually reckoned, the law generally rejecting all fractions of a day, in order to avoid disputes. Therefore, if I am bound to pay money on any certain day, I discharge the obligation if I pay it before twelve o'clock at night, after which the following day commences.[4]

Every estate which must expire at a period certain and prefixed, by whatever words created, is an estate for years. [143] And therefore this estate is frequently called a term, *terminus,* because its duration or continuance is bounded, limited, and determined. But *id certum est, quod certum reddi potest;*[5] therefore if a man make a lease to another for so many years as J. S. shall name, it is a good lease for years. For though it is at present uncertain, yet when J. S. hath named the years, it is then reduced to a certainty. If no day of commencement is named in the creation of this estate, it begins from the making, or delivery, of the lease. A lease for so many years as J. S. shall live is void from the beginning,[5a] for it is neither certain nor can ever be reduced to a certainty during the continuance of the lease. And the same doctrine holds if a person make a lease of his glebe for so many years as he shall continue parson of Dale, for this is still more uncertain. But a lease

3. In the United States a month generally means a calendar month. See Rev. Stat. Ill., ch. 74, sec. 10; 2 Bouvier's Law Dict. Month.

4. In computations of interest or discount for less than a month, the word day by statute in Illinois means the thirtieth part of a month. Rev. Stat. Ill., ch. 74, sec. 10. See, generally, 1 Bouvier Law Dict. Day.

5. That is certain, which can be made certain.

5a. That is as a lease for years. It may, if accompanied by livery of seisin, create an estate for life.

for twenty or more years, if J. S. shall so long live, or if he should so long continue parson, is good. An estate for life, even if it be *pur auter vie*,[6] is a freehold, but **an estate for a thousand years is only a chattel,** and reckoned part of the personal estate.[7] Hence it follows that a lease for years may be made to commence *in futuro*,[7a] though a lease for life cannot. **For no estate of freehold** [by a common-law conveyance] **can commence in futuro,** because it cannot be created at common law without livery of seisin or corporal possession of the land; and corporal possession cannot be given of an estate now, which is not to commence now, but hereafter. [144] And because no livery of seisin is necessary to a lease for years, such lessee is not said to be *seised,* or to have true legal seisin of the lands. Nor indeed does the bare lease vest any estate in the lessee, but only gives him a right of entry on the tenement, which right is called his *interest in the term,* or *interesse termini;* but when he has actually so entered, and thereby accepted the grant, the estate is then, and not before, vested in him, and he is *possessed,* not properly of the land, but of the term of years, the possession or seisin of the *land* remaining still in him who hath the freehold. Thus the word **term** does not merely signify the time specified in the lease, but the estate also and interest that passes by that lease, and therefore the *term* may expire during the continuance of the *time,* as by surrender, forfeiture, and the like. For which reason if I grant a lease to A for the term of three years, and after the expiration of the said *term* to B for six years, and A surrenders or forfeits his lease at the end of *one* year, B's interest shall immediately take effect; but if the remainder had been to B from and after the expiration of the said *three years,* or from and after the expiration of the said *time,* in this case B's interest will not commence till the time is fully elapsed, whatever may become of A's term.

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6. For the life of another.

7. Leases for ninety-nine years on a stipulated ground rent with provisions for revaluation and appraisement at stated intervals are not uncommon in our large cities.

7a. In the future.

Tenant for term of years hath incident to and inseparable from his estate, unless by special agreement, the same **estovers** which we formerly observed that tenant for life was entitled to; that is to say, house-bote, fire-bote, plough-bote, and hay-bote, terms which have been already explained.

With regard to **emblements**, or the profits of lands sowed by tenant for years, there is this difference between him and tenant for life, that where the term of tenant for years depends upon a certainty, as if he holds from midsummer for ten years, and in the last year he sows a crop of corn and it is not ripe and cut before midsummer, the end of his term, the landlord shall have it; for the tenant knew the expiration of his term, and therefore it was his own folly to sow what he could never reap the profits of. [145] But where the lease for years depends upon an uncertainty, as upon the death of a lessor, being himself only tenant for life, or being a husband seised in right of his wife, or if the term of years be determinable upon a life or lives,—in all these cases the estate for years not being certainly to expire at a time foreknown, but merely by the act of God, the tenant, or his executors, shall have the emblements in the same manner that a tenant for life or his executors shall be entitled thereto. Not so if it determine by the act of the party himself, as if tenant for years does anything that amounts to a forfeiture, in which case the emblements shall go to the lessor and not to the lessee, who hath determined his estate by his own default.[8]

II. The second species of estates not freehold are **estates at will.** An estate at will is where lands and tenements are

8. See Hopkins on Real Prop., 61. "It may be stated as a general rule that every person having an uncertain interest or estate in land, and whose estate is determined by the act of God, or by the happening of some uncertain event other than his own act, before the severance of the crops plainted or sowed by him thereon, shall have the right to remove the emblements; or if the estate has been determined by reason of his death, they shall pass to his personal representatives." Ewell on Fixtures (2d Ed.), *256 and notes. A tenant at sufferance is not entitled to emblements. Miller v. Cheney, 88 Ind. 470.

let by one man to another, to have and to hold at the will of the lessor, and the tenant by force of this lease obtains possession. Such tenant hath no certain indefeasible estate, nothing that can be assigned by him to any other, because the lessor may determine his will and put him out whenever he pleases. **But every estate at will is at the will of both parties,** landlord and tenant, so that either of them may determine his will and quit his connection with the other at his own pleasure. Yet this must be understood with some restriction. For if the tenant at will sows his land, and the landlord, before the corn is ripe, or before it is reaped, puts him out [or if the tenant dies], yet the tenant [or his personal representative in case of his death] shall have the **emblements,** and free ingress, egress, and regress to cut and carry away the profits.[9] [146] But it is otherwise, and upon reason equally good, where the tenant himself determines the will, for in this case the landlord shall have the profits of the land.

What act does, or does not, amount to a determination of the will on either side has formerly been matter of great debate in our courts. But it is now, I think, settled that (besides the express determination of the lessor's will, by declaring that the lessee shall hold no longer, which must either be made upon the land, or notice must be given to the lessee) the exertion of any act of ownership by the lessor,— as entering upon the premises and cutting timber, taking a distress for rent and impounding it thereon, or making a feoffment or lease for years of the land to commence immediately,— any act of desertion by the lessee, as assigning his estate to another, or committing waste, which is an act inconsistent with such a tenure, or, which is *instar omnium,*[1] the death or outlawry of either lessor or lessee, puts an end to or determines the estate at will.

The lessee, after the determination of the lessor's will, shall have reasonable ingress and egress to fetch away his goods and utensils. [147] And if rent be payable quarterly

9. See note, *supra;* Ewell on Fixtures, *260 and notes.

1. Equal to all.

or half-yearly, and the lessee determines the will, the rent shall be paid to the end of the current quarter or half year. Courts of law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be **tenancies from year to year**[2] so long as both parties please, especially where an annual rent is reserved, in which case they will not suffer either party to determine the tenancy, even at the end of the year, without reasonable notice to the other, which is generally understood to be six months.

There is one species of estates at will that deserves a more particular regard than any other, and that is **an estate held by copy of court-roll, or, as we usually call it, a copyhold estate.**[3] This, as was before observed, was in its original and foundation nothing better than a mere estate at will. But the kindness and indulgence of successive lords of manors having permitted these estates to be enjoyed by the tenants and their heirs, according to particular customs established in their respective districts, therefore, though they still are held at the will of the lord, and so are in general expressed in the court-rolls to be, yet that will is qualified, restrained, and limited to be exerted according to the custom of the manor. This custom, being suffered to grow up by the lord, is looked upon as the evidence and interpreter of his will. His will is no longer arbitrary and precarious, but fixed and ascertained by the custom to be the same, and no other, that has time out of mind been exercised and declared by his ancestors. **A copyhold tenant is therefore now full as properly a tenant by the custom as a tenant at will, the custom having arisen from a series of uniform wills.** [148]

Almost every copyhold tenant being therefore thus tenant at the will of the lord, according to the custom of the manor, such tenant may have, so far as the custom warrants, any other of the estates or quantities of interest which we have hitherto considered or may hereafter consider, and hold them united with this customary estate at will. A copyholder may in many manors be tenant in fee-simple, in fee-tail, for life, by the curtesy, in dower, for years, at sufferance, or on condition; subject, however, to be deprived of these estates upon the concurrence of those circumstances which the will of the lord, promulgated by immemorial custom, has declared to be a forfeiture, or absolute determination of those interests: as in some manors the want of issue male, in others the cutting down timber, the non-payment of a fine, and the like. Yet none

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2. See Rice's Modern Law of Real Property (1897), 349-351 and notes; 1 Greenleaf's Cruise on Real Prop., *245.

3. Not applicable to this country.

of these interests amount to a freehold; for the freehold of the whole manor abides always in the lord only, who hath granted out the use and occupation, but not the corporeal seisin or true legal possession, of certain parcels thereof to these his customary tenants at will.

III. **An estate at sufferance** is where one comes into possession of land by lawful title, but keeps it afterwards without any title at all.[4] [150] As if a man takes a lease for a year, and after a year is expired continues to hold the premises without any fresh leave from the owner of the estate. Or if a man maketh a lease at will, and dies, the estate at will is thereby determined; but if the tenant continueth possession, he is tenant at sufferance. But no man can be tenant at sufferance against the king, to whom no *laches*, or neglect, in not entering and ousting the tenant is ever imputed by law, but his tenant, so holding over, is considered as an absolute intruder. But in the case of a subject, this estate may be destroyed whenever the true owner shall make an actual entry on the lands and oust the tenant. For **before entry he cannot maintain an action of trespass against the tenant by sufferance**, as he might against a stranger; and the reason is because the tenant, being once in by a lawful title, the law (which presumes no wrong in any man) will suppose him to continue upon a title equally lawful, unless the owner of the land by some public and avowed act, such as entry is, will declare his continuance to be tortious, or, in common language, wrongful.

Landlords are obliged in these cases to make formal entries upon their lands, and recover possession by the legal process of ejectment, and at the utmost, by the common law, the tenant was bound to account for the profits of the land so by him detained.[5] [151]

4. Rice's Real Prop., 351; 1 Greenleaf's Cruise on Real Prop. (1856), ch. 2. This is a valuable treatise on the common law of real property.

5. See Rev. Stat. Ill., ch. 80 and other local statutes.

CHAPTER X.

OF ESTATES UPON CONDITION.

An estate upon condition is such whose existence depends upon the happening or not happening of some uncertain event, whereby the estate may be either originally created or enlarged or finally defeated. [152] These conditional estates are indeed more properly qualifications of other estates than a distinct species of themselves, seeing that any quantity of interest, a fee, a freehold, or a term of years, may depend upon these provisional restrictions.

Estates, upon condition thus understood, are of two sorts: 1. Estates upon condition *implied;* 2. Estates upon condition *expressed,* under which last may be included; 3. Estates held *in vadio, gage,* or *pledge;* 4. Estates by *statute merchant,* or *statute staple;* 5. Estates held by *elegit.*

1. **Estates upon condition implied in law** are where a grant of an estate has a condition annexed to it inseparably from its essence and constitution, although no condition be expressed in words. As if a grant be made to a man of an **office,** generally without adding other words, the law tacitly annexes hereto a secret condition, that the grantee shall duly execute his office, on breach of which condition it is lawful for the grantor or his heirs to oust him and grant it to another person. [153] For an office, either public or private, may be forfeited by *mis-user* or *non-user,* both of which are breaches of this implied condition. **Franchises** also, being regal privileges in the hands of a subject, are held to be granted on the same condition of making a proper use of them, and therefore they may be lost and forfeited, like offices, either by abuse or by neglect.[6]

Upon the same principle proceed all the **forfeitures** which are given by law of life estates and others for any acts done

6. Neither offices nor franchises exist in the United States in the sense in which the terms are here used. In the case of a corporate franchise, however, a forfeiture may be enforced by an information in the nature of a *quo warranto* or other corresponding proceeding.

by the tenant himself that are incompatible with the estate which he holds. As, if tenants for life or years enfeoff a stranger in fee-simple, this is by the common law a forfeiture of their several estates, being a breach of the condition which the law annexes thereto, viz., that they shall not attempt to create a greater estate than they themselves are enitled to.[7]

II. **An estate on condition expressed in the grant itself** is where an estate is granted, either in *fee-simple or otherwise,* with an express qualification annexed, whereby the estate granted shall either commence, be enlarged, or be defeated, upon performance or breach of such qualification or condition.[8] [154] These conditions are therefore either *precedent* or *subsequent.* **Precedent** are such as must happen or be performed before the estate can vest or be enlarged; **subsequent** are such, by the failure or non-performance of which an estate already vested may be defeated.[9]

A distinction is however made between a condition in deed and a limitation, which Littleton denominates also a *condition in law.*[1] [155] For when an estate is so expressly confined and limited by the words of its creation that it cannot endure for any longer time than till the contingency happens upon which the estate is to fail, this is denominated a *limitation,* as when land is granted to a man *so long as* he is parson of Dale, or *while* he continues unmarried, or *until* out of the rents and profits he shall have made 500*l.*, and the like. In such case the estate determines as soon as the contingency happens (when he ceases to be parson, marries a wife, or has received the 500*l.*), and the next subsequent estate, which depends upon such determination, becomes

7. As a general rule in this country a conveyance passes no more than the grantor can lawfully convey and hence no forfeiture accrues in the case stated in the text. As to restraints on alienation imposed in the deed creating the estate, see Hopkins, Real Prop., 394-397.

8. Hopkins, Real Prop., 169.

9. Hopkins, Real Prop., 170.

1. Mr. Hopkins defines an estate on limitation as "one which is created to continue until the happening of a contingency upon which it comes to an end without entry." "Conditions cut short an existing estate. Limitations do not, but mark its natural end." Hopkins, Real Prop., 177, 178.

immediately vested without any act to be done by him who is next in expectancy. But when an estate is, strictly speaking, upon *condition in deed* (as if granted expressly *upon condition,* to be void upon the payment of 40*l.* by the grantor, or *so that* the grantee continues unmarried, or *provided* he goes to York, &c.), the law permits it to endure beyond the time when such contingency happens, unless the grantor or his heirs or assigns take advantage of the breach of the condition, and make either an entry or a claim in order to avoid the estate.[2] Yet, though strict words of condition be used in the creation of the estate, if on breach of the condition the estate be limited over to a third person, and does not immediately revert to the grantor or his representatives (as if an estate be granted by A to B, on condition that within two years B intermarry with C, and on failure thereof then to D and his heirs), this the law construes to be a limitation, and not a condition. [156]

In all these instances of limitations or conditions subsequent, it is to be observed that **so long as the condition, either express or implied, either in deed or in law, remains unbroken, the grantee may have an estate of freehold,** provided the estate upon which such condition is annexed be in itself of a freehold nature: as if the original grant express either an estate of inheritance, or for life; or no estate at all, which is constructively an estate for life. For, the breach of these conditions being contingent and uncertain, this uncertainty preserves the freehold, because the estate is capable to last for ever, or at least for the life of the tenant, supposing the condition to remain unbroken. But where the estate is at the utmost a chattel interest, which must determine at a time certain, and may determine sooner (as a grant for ninety-nine years, provided A, B, and C, or the survivor of them, shall so long live), this still continues a mere chattel, and is not, by such its uncertainty, ranked among estates of freehold.

2. An entry to enforce a forfeiture for breach of condition can be made only by the grantor or his heirs, or by the assignee of a reversion after a leasehold estate where the covenants run with the land. Hopkins, Real Prop., 176.

These express conditions, if they be impossible at the time of their creation, or afterwards become impossible by the act of God or the act of the feoffor himself, or if they be *contrary to law* or *repugnant* to the nature of the estate, are void.[3] **In any of which cases, if they be conditions subsequent,** that is, to be performed after the estate is vested, the estate shall become absolute in the tenant. [157] For he hath by the grant the estate vested in him, which shall not be defeated afterwards by a condition either impossible, illegal, or repugnant. **But if the condition be precedent,** or to be performed before the estate vests as a grant to a man, that if he kills another or goes to Rome in a day he shall have an estate in fee, here, the void condition being precedent, the estate which depends thereon is also void, and the grantee shall take nothing by the grant, for he hath no estate until the condition be performed.

There are some estates defeasible upon condition subsequent, that require a more peculiar notice; such are:—

III. **Estates held in vadio, in gage or pledge,** which are of two kinds, *vivium vadium,* or living pledge, and *mortuum vadium,* dead pledge, or *mortgage.*

Vivum vadium, or living pledge, is when a man borrows a sum (suppose 200*l.*) of another, and grants him an estate, as of 20*l. per annum,* to hold till the rents and profits shall repay the sum so borrowed. This is an estate conditioned to be void as soon as such sum is raised. And in this case the land or pledge is said to be living, it subsists and survives the debt, and immediately on the discharge of that, results back to the borrower.

Mortuum vadium, a dead pledge or mortgage (which is much more common than the other), is where a man borrows of another a specific sum (*e. g.* 200*l.*) and grants him an estate in fee, on condition that if he, the mortgagor, shall repay the mortgagee the said sum of 200*l.* on a certain day mentioned in the deed, that then the mortgagor may re-

3. Hopkins, Real Prop., 172, 173. See, generally, Lind. Int. to Jur. App. *lxi.*

enter on the estate so granted in pledge; or, as is now the more usual way, that then the mortgagee shall re-convey the estate to the mortgagor. In this case the land which is so put in pledge is by law, in case of non-payment at the time limited, forever dead and gone from the mortgagor, and the mortgagee's estate in the lands is then no longer conditional, but absolute. [158] But so long as it continues conditional, that is between the time of lending the money and the time allotted for payment, the mortgagee is called **tenant in mortgage.**

As soon as the estate is created, the mortgagee may immediately enter on the lands, but is liable to be dispossessed upon performance of the condition by payment of the mortgage-money at the day limited. And therefore the usual way is to agree that the mortgagor shall hold the land till the day assigned for payment, when, in case of failure whereby the estate becomes absolute, the mortgagee may enter upon it and take possession, without any possibility *at law* of being afterwards evicted by the mortgagor, to whom the land is now forever dead. But here again the courts of equity interpose, and though a mortgage be thus forfeited, and the estate absolutely vested in the mortgagee at the common law, yet they will consider the real value of the tenements compared with the sum borrowed. [159] And if the estate be of greater value than the sum lent thereon, they will allow the mortgagor at any reasonable time to recall or redeem his estate, paying to the mortgagee his principal, interest, and expenses. This reasonable advantage allowed to mortgagors is called the **equity of redemption,** and this enables a mortgagor to call on the mortgagee who has possession of his estate to deliver it back and account for the rents and profits received on payment of his whole debt and interest, thereby turning the *mortuum* into a kind of *vivium vadium.* But, on the other hand, the mortgagee may either compel the sale of the estate, in order to get the whole of his money immediately, or else call upon the mortgagor to redeem his estate presently, or in default

thereof to be forever **foreclosed from redeeming the same,** that is, to lose his equity of redemption without possibility of recall.[4]

IV. A fourth species of estates, defeasible on condition subsequent, are those held by **statute merchant** and **statute staple,** which are very nearly related to the *vivum vadium* before mentioned, or estate held till the profits thereof shall discharge a debt liquidated or ascertained. [Not in use in the United States.] For both the statute merchant and statue staple are securities for money: the one entered into before the chief magistrate of some trading town, pursuant to the statute 13 Edw. I. *de mercatoribus*,[5] and thence called a statute merchant; the other pursuant to the statute 27 Edw. III. c. 9, before the mayor of the staple,—that is to say, the grand mart for the principal commodities or manufactures of the kingdom, formerly held by act of parliament in certain trading towns, from whence this security is called a statute staple. They are both, I say, securities for debts acknowledged to be due, and

4. The foregoing is a brief and accurate statement of the law as it existed in the author's time.

A real estate mortgage is a conveyance of land as security for the performance of a promise, usually, though not necessarily, the payment of money; and is usually in the form of an estate on condition subsequent expressed in the deed, though in equity a deed absolute on its face will as between the parties thereto be held to be a mortgage, if such was the agreement. Hopkins, Real Prop., 180, 187.

Two views are held in the different states as to the nature of a mortgage: (1) The common law theory that a mortgage is an estate in land and that the mortgagee is the owner of the land; (2) The equitable theory that a mortgage is a mere security and that the mortgagee has only a lien on the land. The mortgagor's equity of redemption is recognized in all the states. Hopkins, Real Prop., 182-184.

The mortgagee is entitled to possession unless otherwise provided by statute, as in many states, or by agreement, which may be express or impled. Hopkins, Real Prop., 196.

The methods of foreclosure vary in the different states, as by entry, writ of entry, or ejectment to recover the possession of the land, or by proceedings in equity to bar the equity of redemption. In some of the states a strict foreclosure or bar of the equity of redemption is decreed; but in most of the states a sale of the land is decreed and the surplus, if any, after payment of the debt, interest and costs, is returned to the mortgagor. In some states besides a judicial foreclosure there may also be a sale by virtue of a power of sale, if such there be, in the mortgage. See Hopkins, Real Prop., 242-250, and the local statutes. See, generally, Jones on Mortgages (1904), 2 vols.; Wiltsie on Mortgage Foreclosure (1913), 2 vols.

5. Concerning merchants.

originally permitted only among traders for the benefit of commerce, whereby not only the body of the debtor may be imprisoned and his goods seized in satisfaction of the debt, but also his lands may be delivered to the creditor till out of the rents and profits of them the debt may be satisfied; and during such time as the creditor so holds the lands he is tenant by statute merchant or statute staple. There is also a similar security,—the recognizance in the nature of a statute staple, acknowledged before either of the chief justices or (out of term) before their substitutes, the Mayor of the Staple at Westminster and the Recorder of London,—whereby the benefit of this mercantile transaction is extended to all the king's subjects in general, by virtue of the statute 23 Hen. VIII. c. 6, amended by 8 Geo. I. c. 25, which directs such recognizances to be enrolled and certified into chancery. But these by the statute of frauds, 29 Car. II. c. 3, are only binding upon the lands in the hands of *bona fide*[6] purchasers from the day of their enrolment, which is ordered to be marked on the record.

V. Another similar conditional estate, created by operation of law for security and satisfaction of debts, is called **an estate by elegit.** [161] What an *elegit* is, and why so called, will be explained in the third part of these Commentaries. At present I need only mention that it is the name of a writ founded on the statute of Westm. 2, by which, after a plaintiff has obtained judgment for his debt at law, the sheriff gives him possession of one-half of the defendant's lands and tenements, to be occupied and enjoyed until his debt and damages are fully paid, and during the time he so holds them he is called tenant by *elegit*.[7]

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6. In good faith.

7. A writ of execution. See 1 Bouvier Law Dict. *elegit*. It is possible that it may be still in use in some of the states, but we know of none.

CHAPTER XI.

OF ESTATES IN POSSESSION, REMAINDER, AND REVERSION.

Estates with respect to the time of their enjoyment may either be in *possession* or in *expectancy;* and of expectancies there are two sorts: one created by the act of the parties, called a *remainder;* the other by act of law, and called a *reversion.* [163]

I. **Of estates in possession** (which are sometimes called estates *executed,* whereby a present interest passes to and resides in the tenant not depending on any subsequent circumstance or contingency, as in the case of estate *executory*), there is little or nothing peculiar to be observed. All the estates we have hitherto spoken of are of this kind.

II. **An estate in remainder**[1] may be defined to be an estate limited to take effect and be enjoyed after another estate is determined. As if a man seised in fee-simple granteth lands to A for twenty years, and, after the determination of the said term, then to B and his heirs forever. Here A is tenant for years, remainder to B in fee. [164] In the first place, an estate for years is created or carved out of the fee and given to A, and the residue or remainder of it is given to B. Both these interests are in fact only one estate, the present term of years and the remainder afterwards, when added together, being equal only to one estate in fee. And hence also it is easy to collect, that **no remainder can be limited after the grant of an estate in fee-simple,** because a fee-simple is the highest and largest estate that a subject is capable of enjoying, and he that is tenant in fee hath in him the *whole* of the estate. A remainder, therefore, which is only a portion, or residuary *part,* of the estate, cannot be reserved after the whole is disposed of.

1. **And, first, there must necessarily be some particular**

1. For a general consideration of the American law of vested remainders, see Hopkins, Real Prop., 281-289 and cases cited. Consult also the local statutes modifying the common law rules so well stated in the text.

estate precedent to the estate in remainder.[2] [165] As an estate for years to A, remainder to B for life; or an estate for life to A, remainder to B in tail. This precedent estate is called the *particular* estate, as being only a small part or *particula* of the inheritance, the residue or remainder of which is granted over to another. The necessity of creating this preceding particular estate, in order to make a good remainder, arises from this plain reason: that *remainder* is a relative expression, and implies that some part of the thing is previously disposed of; for where the whole is conveyed at once, there cannot possibly exist a remainder, but the interest granted, whatever it be, will be an estate in possession.

An estate created to commence at a distant period of time, without any intervening estate, is therefore properly no remainder; it is the whole of the gift, and not a residuary part. And such future estates can only be made of chattel interests, which were considered in the light of mere contracts by the ancient law, to be executed either now or hereafter as the contracting parties should agree. But an estate of freehold must be created to commence immediately; for it is an ancient rule of the common law that **an estate of freehold cannot be created** [i. e., **by a common-law conveyance] to commence in futuro,**[3] but it ought to take effect presently either in possession or remainder, because at common law no freehold in lands could pass without livery of seisin, which must operate either immediately or not at all. [166] So that when it is intended to grant an estate of freehold, whereof the enjoyment shall be deferred till a future time, it is necessary to create a previous particular state, which may subsist till that period of time is completed, and for the grantor to deliver immediate possession of the land to the tenant of this particular estate, which is construed to be giving possession to him in remainder, since his estate and that of the particular tenant are one and the same estate in law; as, where one leases to A for three years, with remainder to B in fee, and makes livery of seisin to A.

2. Hopkins, Real Prop., 284.

3. In the future.

As no remainder can be created without such a precedent particular estate, therefore **the particular estate is said to support the remainder.** But a lease at will is not held to be such a particular estate as will support a remainder over. Every remainder must be part of one and the same estate, out of which the preceding particular estate is taken. [167] And hence it is generally true, that if the particular estate is void in its creation, or by any means is defeated afterwards, the remainder supported thereby shall be defeated also; as, where the particular estate is an estate for the life of the person not *in esse,* or an estate for life upon condition, on breach of which condition the grantor enters and avoids the estate. In either of these cases the remainder over is void.

2. **The remainder must commence or pass out of the grantor at the time of the creation of the particular estate;** as, where there is an estate to A for life, with remainder to B in fee. Here B's remainder in fee passes from the grantor at the same time that seisin is delivered to A of his life estate in possession. And it is this which induces the necessity at common law of livery of seisin being made on the particular estate whenever a *freehold* remainder is created. For if it be limited even on an estate for years it is necessary that the lessee for years should have livery of seisin, in order to convey the freehold from and out of the grantor, otherwise the remainder is void. Not that the livery is necessary to strengthen the estate for years, but as livery of the land is requisite to convey the freehold, and yet cannot be given to him in remainder without infringing the possession of the lessee for years, therefore the law allows such livery made to the tenant of the particular estate to relate and inure to him in remainder, as both are but one estate in law.

3. **The remainder must vest in the grantee during the continuance of the particular estate, or eo instanti[4] that it determines.** [168] Thus, if an estate be limited to A for life, remainder to the eldest son of B in tail, and A dies before B hath any son, here the remainder will be void, for

4. At that instant.

it did not vest in any one during the continuance nor at the determination of the particular estate; and even supposing that B should afterwards have a son, he shall not take by this remainder, for as it did not vest at or before the end of the particular estate, it never can vest at all, but is gone forever. And this depends upon the principle before laid down, that the precedent particular estate and the remainder are one estate in law; they must therefore subsist and be *in esse* at one and the same instant of time, either during the continuance of the first estate, or at the very instant when that determines, so that no other estate can possibly come between them.

It is upon these rules, but principally the last, that the doctrine of *contingent* remainders depends. For remainders are either *vested* or *contingent*. **Vested remainders** (or remainders *executed*, whereby a present interest passes to the party, though to be enjoyed *in futuro*)[5] are where the estate is invariably fixed to remain to a determinate person, after the particular estate is spent. As if A be tenant for twenty years, remainder to B in fee: here B's is a vested remainder, which nothing can defeat or set aside.[6] [169]

Contingent or executory remainders (whereby no present interest passes) are where the estate in remainder is limited to take effect either to a dubious and uncertain *person*, or upon a dubious and uncertain *event;* so that the particular estate may chance to be determined, and the remainder never take effect.[7]

First, **they may be limited to a dubious and uncertain person.** As if A be tenant for life, with remainder to B's eldest son (then unborn) in tail, this is a contingent remainder, for it is uncertain whether B will have a son or no; but the instant that a son is born the remainder is no longer contingent, but vested. Though if A had died before the contingency happened, that is, before B's son was born, the remainder would have been absolutely gone, for the particular estate was determined before the remainder could vest.

5. In the future.

6. See Hopkins, Real Prop., 288, 289.

7. Hopkins, Real Prop., 289.

Nay, by the strict rule of law, if A were tenant for life, remainder to his eldest son in tail, and A died without issue born, but leaving his wife *enseint*, or big with child, and after his death a posthumous son was born, this son could not take the land by virtue of this remainder, for the particular estate determined before there was any person *in esse*,[8] in whom the remainder could vest. But to remedy this hardship, it is enacted by statute 10 & 11 W. III. c. 16, that posthumous children shall be capable of taking in remainder in the same manner as if they had been born in their father's lifetime, that is, the remainder is allowed to vest in them while yet in their mother's womb.[9]

This species of contingent remainders to a person not in being must, however, be limited to some one that may, by common possibility or potentia propinqua,[1] be in esse at or before the particular estate determines. As if an estate be made to A for life, remainder to the heirs of B: now if A dies before B, the remainder is at an end; for during B's life he has no heir, *nemo est haeres viventis;* but if B dies first, the remainder then immediately vests in his heir, who will be entitled to the land on the death of A. [170] This is a good contingent remainder, for the possibility of B's dying before A is *potentia propinqua*, and therefore allowed in law. But a remainder to the right heirs of B (if there be no such person as B *in esse*), is void. For here there must two contingencies happen: first, that such a person as B shall be born, and secondly, that he shall also die during the continuance of the particular estate, which make it *potentia remotissima*,[2] a most improbable possibility. A remainder to a man's eldest son, who hath none (we have seen) is good, for by common possibility he may have one; but if it be limited in particular to his son John or Richard, it is bad, if he have no son of that name, for it is too remote a possibility that he should not only have a son, but a son of a particular name. A limitation of a remainder to a bastard before it is born is not good, for though the law allows the possibility of having bastards, it presumes it to be a very remote and improbable contingency. Thus may

8. In being.

9. Hopkins, Real Prop., 290. So by statute in some states. Id.; 1 Stim. Am. St. Law, § 1413.

1. A near possibility.

2. A very remote possibility.

a remainder be contingent on account of the uncertainty of the *person* who is to take it.

A remainder may also be contingent, where the person to whom it is limited is fixed and certain, but the event upon which it is to take effect is vague and uncertain. As, where land is given to A for life, and in case B survives him, then with remainder to B in fee. Here B is a certain person, but the remainder to him is a contingent remainder, depending upon a dubious event, the uncertainty of his surviving A. During the joint lives of A and B it is contingent, and if B dies first, it never can vest in his heirs, but is forever gone; but if A dies first the remainder to B becomes vested.

Contingent remainders of either kind, if they amount to a freehold, cannot be limited on an estate for years, or any other particular estate less than a freehold.[3] [171] Thus if land be granted to A for ten years, with remainder in fee to the right heirs of B, this remainder is void, but if granted to A *for life*, with a like remainder, it is good. For unless the freehold passes out of the grantor at the time when the remainder is created, such freehold remainder is void; it cannot pass out of him without vesting somewhere; and in the case of a contingent remainder it must vest in the particular tenant, else it can vest nowhere. Unless, therefore, the estate of such particular tenant be of a freehold nature, the freehold cannot vest in him, and consequently the remainder is void.

Contingent remainders may be defeated by destroying or determining the particular estate upon which they depend, before the contingency happens whereby they become vested.[4] Therefore, when there is tenant for life, with divers remainders in contingency, he may, not only by his death, but by alienation, surrender, or other methods, destroy and determine his own life estate before any of those remainders vest, the consequence of which is that he utterly

3. Hopkins, Real Prop., 291.

4. In many states statutes provide that the acts of the tenant of the particular estate shall not defeat the remainder; and that the termination of the particular estate before the vesting of the remainder shall not defeat the remainder. Hopkins, Real Prop., 294; 1 Stim. Am. St. Law, §§ 1403, 1426.

defeats them all. In these cases, therefore, it is necessary to have trustees appointed to perserve the contingent remainders, in whom there is vested an estate in remainder for the life of the tenant for life, to commence when his estate determines.

In devises by last will and testament (which, being often drawn up when the party is *inops consilii*,[5] are always more favored in construction than formal deeds, which are presumed to be made with great caution, forethought, and advice) remainders may be created in some measure contrary to the rules before laid down, though our lawyers will not allow such dispositions to be strictly remainders, but call them by another name, that of *executory devises*, or devises hereafter to be executed. [172]

An executory devise of lands is such a disposition of them by will that thereby no estate vests at the death of the devisor, but only on some future contingency. It differs from a remainder in three very material points: 1. **That it needs not any particular estate to support it.** 2. **That by it a fee-simple, or other less estate, may be limited after a fee-simple.** [173] 3. **That by this means a remainder may be limited of a chattel interest, after a particular estate for life created in the same.**[6]

1. **The first case happens when a man devises a future estate to arise upon a contingency**, and, till that contingency happens, does not dispose of the feesimple, but leaves it to descend to his heirs at law. As if one devises land to a feme-sole and her heirs, upon her day of marriage: here is in effect a contingent remainder without any particular estate to support it, a freehold commencing *in futuro*.[7] This limitation, though it would be void in a deed, yet is good in a will by way of executory devise. For since by a devise a freehold may pass without corporal tradition or livery of seisin (as it must do if it passes at all), therefore it may commence *in futuro*, because the principal reason why it cannot commence *in futuro* in other cases, is the necessity of actual seisin, which always operates *in prae-*

5. Lacking counsel.
6. Hopkins, Real Prop., 300.
7. In the future.

senti.[8] And, since it may thus commence *in futuro*, there is no need of a particular estate to support it, the only use of which is to make the remainder by its unity with the particular estate a present interest. And hence also it follows that such an executory devise, not being a present interest, cannot be barred by a recovery suffered before it commences.

2. **By executory devise, a fee, or other less estate, may be limited after a fee.** And this happens where a devisor devises his whole estate in fee, but limits a remainder thereon to commence on a future contingency. As if a man devises land to A and his heirs; but if he dies before the age of twenty-one, then to B and his heirs; this remainder, though void in deed, is good by way of executory devise. But, in both these species of executory devises, the contingencies ought to be such as may happen within a reasonable time; as within one or more life or lives in being, or within a moderate term of years, for courts of justice will not indulge even wills, so as to create a perpetuity, which the laws abhors. [174] **The utmost length that has been hitherto allowed for the contingency of an executory devise** of either kind to happen in, is that of a life or lives in being, and one and twenty years afterwards.[9]

3. **By executory devise a term of years may be given to one man for his life, and afterwards limited over in remainder to another,** which could not be done by deed; for by law the first grant of it to a man for life was a total disposition of the whole term, a life estate being esteemed of a higher and larger nature than any term of years. Yet, in order to prevent the danger of perpetuities, it was settled that though such remainders may be limited to as many persons successively as the devisor thinks proper, yet they

8. In the present.

9. This rule prevails, generally, in the United States, except that in some states all future estates must vest within two lives in being. Hopkins, Real Prop., 322-330; Gray, Perp., 144; 1 Stim. Am. St. Law, §§ 1440, 1442. An unborn child being considered as in being for the purpose of taking, it is possible that three periods of gestation may occur in a limitation without violation of the rule. See Hopkins, Real Prop., 324, note; Gray, Perp., § 222; Thelluson v. Woodford, 11 Ves. 112.

must all be *in esse* during the life of the first devisee, for then all the candles are lighted and are consuming together, and the ultimate remainder is in reality only to that remainder-man who happens to survive the rest. And it was also settled that such remainder may not be limited to take effect unless upon such contingency as must happen (if at all) during the life of the first devisee. [175]

III. **An estate in reversion** is the residue of an estate left in the grantor, to commence in possession after the determination of some particular estate granted out by him. Sir Edward Coke describes a reversion to be the returning of land to the grantor or his heirs after the grant is over. As, if there be a gift in tail, the reversion of the fee is, without any special reservation, vested in the donor by act of law. And so also the reversion, after an estate for life, years, or at will, continues in the lessor. For the fee-simple of all lands must abide somewhere; and if he who was before possessed of the whole carves out of it any smaller estate and grants it away, whatever is not so granted remains in him. **A reversion is never, therefore, created by deed or writing, but arises from construction of law; a remainder can never be limited, unless by either deed or devise.** But both are equally transferable, when actually vested, being both estates *in praesenti*,[1] though taking effect *in futuro*.[2]

The usual incidents to reversions are said to be fealty and rent.[2a] [176] When no rent is reserved on the particular estate, fealty however results of course, as an incident quite inseparable, and may be demanded as a badge of tenure, or acknowledgment of superiority, being frequently the only evidence that the lands are holden at all. Where rent is reserved it is also incident, though not inseparably so, to the reversion. The rent may be granted away, reserving the reversion, and the reversion may be granted away, reserving the rent, by *special* words; but by a *general* grant of the reversion, the rent will pass with it as incident

1. In the present.

2. In the future.

2a. The tenant may not dispute his landlord's title; and the landlord or reversioner may maintan an action for wrongful acts causing damage to his reversionary interest. See *Hopkins, Real Prop.*, 141, 142 and notes.

thereunto, though by the grant of the rent generally the reversion will not pass. The incident passes by the grant of the principal, but not *e converso*;[3] for the maxim of law is, "*accessorium non ducit, sed sequitur, suum principale.*"[4]

Before we conclude the doctrine of remainders and reversions, it may be proper to observe that whenever a greater estate and a less coincide and meet in one and the same person, without any intermediate estate, the less is immediately annihilated, or, in the law phrase, is said to be **merged**, that is, sunk or drowned in the greater. [177] But they must come to one and the same person in one and the same right [and at the same time], else, if the freehold be in his own right and he has a term in right of another (*en auter droit*), there is no merger.[5] An estate-tail is an **exception** to this rule; for a man may have in his own right both an estate-tail and a reversion in fee, and the estate-tail, though a less estate, shall not merge in the fee. For estates-tail are protected and preserved from merger by the operation and construction, though not by the express words, of the statute *de donis*.[6] [178]

3. On the contrary.

4. The accessory does not lead, but follows its principal.

5. This is only one instance of merger. A note or other simple contract is merged in a bond subsequently given for the same purpose, and this bond may be merged by a judgment rendered upon it.

6. Concerning gifts.

CHAPTER XII.

OF ESTATES IN SEVERALTY, JOINT-TENANCY, COPARCENARY, AND COMMON.

Estates of any quantity or length of duration, and whether they be in actual possession or expectancy, may be held in four different ways: in severalty, in joint-tenancy, in coparcenary, and in common. [179]

I. He that holds lands or tenements in **severalty,** or is sole tenant thereof, is he that holds them in his own right only, without any other person being joined or connected with him in point of interest, during his estate therein. All estates are supposed to be of this sort, unless where they are expressly declared to be otherwise; and in laying down general rules and doctrines, we usually apply them to such estates as are held in severalty.

II. **An estate in joint-tenancy** is where lands or tenements are granted to two or more persons, to hold in fee-simple, fee-tail, for life, for years, or at will. [180]

1. **The creation of an estate in joint-tenancy** depends on the wording of the deed or devise by which the tenants claim title; for **this estate can only arise by purchase or grant,** that is, by the act of the parties, and never by the mere act of law. Now if an estate be given to a plurality of persons without adding any restrictive, exclusive, or explanatory words, as if an estate be granted to A and B and their heirs, this makes them immediately joint tenants in fee of the lands.[1]

2. **The properties of a joint estate** are derived from its unity, which is fourfold: the unity of *interest,* the unity of *title,* the unity of *time,* and the unity of *possession;* or, in other words, joint-tenants have one and the same interest,

1. This is still the rule of the common law where not changed by statute; but in many of the states a limitation that at common law would create a joint tenancy now creates a tenancy in common; and in order to create a joint tenancy express words to that effect must be used in the instrument creating the estate. Hopkins, Real Prop., 333, 335; 1 Stim. Am. St. Law, § 1371B.

accruing by one and the same conveyance, commencing at one and the same time, and held by one and the same undivided possession.

First, **they must have one and the same interest.** [181] One joint-tenant cannot be entitled to one period of duration or quantity of interest in lands and the other to a different: one cannot be tenant for life and the other for years; one cannot be tenant in fee and the other in tail. But if land be limited to A and B for their lives, this makes them joint-tenants of the freehold; if to A and B and their heirs, it makes them joint-tenants of the inheritance. *Secondly,* **joint-tenants must also have an unity of title;** their estate must be created by one and the same act, whether legal or illegal, as by one and the same grant or by one and the same disseisin. Joint-tenancy cannot arise by descent or act of law, but merely by purchase or acquisition by the act of the party; and, unless that act be one and the same, the two tenants would have different titles, and if they had different titles, one might prove good and the other bad, which would absolutely destroy the jointure. *Thirdly,* **there must also be an unity of time;** their estates must be vested at one and the same period as well as by one and the same title. If after a lease for life the remainder be limited to the heirs of A and B, and during the continuance of the particular estate A dies, which vests the remainder of one moiety in his heir, and then B dies, whereby the other moiety becomes vested in the heir of B, now A's heir and B's heir are not joint-tenants of this remainder, but tenants in common, for one moiety vested at one time and the other moiety vested at another. Yet where a feoffment was made to the use of a man and such wife as he should afterwards marry for term of their lives, and he afterwards married, in this case it seems to have been held that the husband and wife had a joint-estate, though vested at different times, because the *use* of the wife's estate was in abeyance and dormant till the intermarriage, and, being then awakened, had relation back, and took effect from the original time of creation. [182] *Lastly,* **in joint-tenancy there must be an unity of possession.** Joint-tenants are

said to be seised, *per my et per tout*, by the *half* or *moiety*, and by *all;* that is, they each of them have the entire possession, as well of every *parcel* as of the *whole*. They have not, one of them a seisin of one half or moiety, and the other of the other moiety, neither can one be exclusively seised of one acre and his companion of another, but each has an undivided moiety of the whole, and not the whole of an undivided moiety. And therefore, **if an estate in fee be given to a man and his wife**, they are neither properly joint-tenants nor tenants in common; for husband and wife being considered as one person in law, they cannot take the estate by moieties, but **both are seized of the entirety**, *per tout, et non per my*,[2] the consequence of which is that neither the husband nor the wife can dispose of any part without the assent of the other, but the whole must remain to the survivor.[3]

Upon these principles, of a thorough and intimate union of interest and possession, depend many other **consequences and incidents to the joint-tenant's estate.** If two joint-tenants let a verbal lease of their land, reserving rent to be paid to one of them, it shall inure to both, in respect of the joint-reversion. If their lessee surrenders his lease to one of them it shall also inure to both, because of the privity or relation of their estate. On the same reason, livery of seisin made to one joint-tenant shall inure to both of them, and the entry, or re-entry, of one joint-tenant is as effectual in law as if it were the act of both. In all actions also relating to their joint-estate one joint-tenant cannot sue or be sued without joining the other. Upon the same ground it is held that one joint-tenant cannot have an action against another

2. By the whole and not by the moiety. These estates have been abolished by statute in many states, though they exist in others. See Hopkins, Real Prop., 337.

3. See the leading cases of Green *ex dem.* Crew v. King, 2 W. Bl. 1211, and Back v. Andrew, 2 Vern. 120; Ewell's Lead. Cas. (1st Ed.), 488. See the notes on pages 491-499, where the cases are collected.

Tenancy by entirety is said by Chancellor Kent to apply to estates in fee, for life or for years. 2 Kent Com., *132. There is, however, no tenancy by entirety in chattels. Polk v. Allen, 19 Mo. 467; Price v. Price, 5 Ala. 578. See, however, 35 N. Y. Superior Ct. 486.

for trespass in respect of his land, for each has an equal right to enter on any part of it. [183] But one joint-tenant is not capable by himself to do any act which may tend to defeat or injure the estate of the other, as to let leases or to grant copyholds; and if any waste be done which tends to the destruction of the inheritance, one joint-tenant may have an action of waste against the other, by construction of the statute Westm. 2, c. 22. So too, though at common law no action of account lay for one joint-tenant against another, unless he had constituted him his bailiff or receiver, yet now by the statute 4 Anne, c. 16, joint-tenants may have actions of account[4] against each other for receiving more than their due share of the profits of the tenements held in joint-tenancy.

From the same principle also arises the remaining grand incident of joint-estates, viz., **the doctrine of survivorship**, by which when two or more persons are seized of a joint-estate, of inheritance, for their own lives, or *pur auter vie*,[5] or are jointly possessed of any chattel-interest, the entire tenancy upon the decease of any of them remains to the survivors, and at length to the last survivor, and he shall be entitled to the whole estate, whatever it be, whether an inheritance or a common freehold only, or even a less estate.

This right of survivorship is called by our ancient authors the *jus accrescendi*, because the right upon the death of one joint-tenant accumulates and increases to the survivors. [184] And this *jus accrescendi* ought to be mutual, which I apprehend to be one reason why neither the king nor any corporation can be a joint-tenant with a private person. For here is no mutuality; the private person has not even the remotest chance of being seised of the entirety by benefit of survivorship, for the king and the corporation can never die.

3. **How may an estate in joint-tenancy be severed and destroyed?** [185] **This may be done by destroying any of its constituent unities.** 1. That of **time**, which respects only the original commencement of the joint-estate, cannot

4. This action is still in use in Illinois. Rev. Stat. Ill., ch. 2.

5. For the life of another.

indeed (being now past) be affected by any subsequent transaction. But, 2. The joint-tenants' estate may be destroyed without any alienation, by merely disuniting their **possession.** And, therefore, if two joint-tenants agree to part their lands and hold them in severalty, they are no longer joint-tenants, for they have now no joint-interest in the whole, but only a several interest respectively in the several parts. And for that reason, also, the right of survivorship is by such separation destroyed. By common law all the joint-tenants might agree to make partition of the lands, but one of them could not compel the other so to do; for this being an estate originally created by the act and agreement of the parties, the law would not permit any one or more of them to destroy the united possession without a similar universal consent. But now by the statutes 31 Hen. VIII. c. 1, and 32 Hen. VII. c. 32, joint-tenants, either of inheritance or other less estates, are compellable by **writ of partition**[6] to divide their lands. 3. The jointure may be destroyed by destroying the **unity of title.** As if one joint-tenant alienes and conveys his estate to a third person, here the joint-tenancy is severed and turned into tenancy in common, for the grantee and the remaining joint-tenant hold by different titles (one derived from the original, the other from the subsequent grantor), though, till partition made, the unity of possession continues. But a devise of one's share by will is no severance of the jointure, for no testament takes effect till after the death of the testator, and by such death the right of the survivor (which accrued at the original creation of the estate, and has therefore a priority to the other) is already vested. [186] 4. It may also be destroyed by destroying the **unity of interest.** And, therefore, if there be two joint-tenants for life and the inheritance is purchased by or descends upon either, it is a severance of the jointure; though if an estate is originally limited to two for life, and after to the heirs of one of them, the freehold shall remain in jointure without merging in the inheritance, because, being created by one and the same conveyance, they are not separate estates

6. See local statutes as to remedies by way of partition.

(which is requisite in order to a merger), but branches of one entire estate. In like manner, if a joint-tenant in fee makes a lease for life of his share, this defeats the jointure, for it destroys the unity both of the title and of interest. And whenever or by whatever means the jointure ceases or is severed, the right of survivorship or *jus accrescendi*, the same instant ceases with it. Yet if one of three joint-tenants alienes his share, the two remaining tenants still hold their parts by joint-tenancy and survivorship; and if one of three joint-tenants release his share to one of his companions, though the joint-tenancy is destroyed with regard to that part, yet the two remaining parts are still held in jointure, for they still preserve their original constituent unities. But when by an act or event different interests are created in the several parts of the estate, or they are held by different titles, or if merely the possession is separated, so that the tenants have no longer these four indispensable properties, a sameness of interest and undivided possession, a title vesting at one and the same time and by one and the same act or grant, the jointure is instantly dissolved.

In general it is advantageous for the joint-tenants to dissolve the jointure, since thereby the right of survivorship is taken away, and each may transmit his own part to his own heirs. [187] Sometimes, however, it is disadvantageous to dissolve the joint-estate: as if there be joint-tenants for life, and they make partition, this dissolves the jointure; and though before they each of them had an estate in the whole for their own lives, and the life of their companion, now they have an estate in a moiety only for their own lives merely, and on the death of either, the reversioner shall enter on his moiety. And therefore if there be two joint-tenants for life, and one grants away his part for the life of his companion, it is a forfeiture; for in the first place, by the severance of the jointure he has given himself in his own moiety only an estate for his own life, and then he grants the same land for the life of another,—which grant by a tenant for his own life merely, is a forfeiture of his estate; for it is creating an estate which may by possibility last longer than that which he is legally entitled to.

III. **An estate held in coparcenary**[7] is where lands of inheritance descend from the ancestor to two or more persons.

7. So called because the coparceners can be compelled to make partition. Mr. Hopkins states that they exist in only a few states. Hopkins Real

It *arises* either by common law or particular custom. By common law, as where a person seised in fee-simple or in fee-tail dies and his next heirs are two or more females, his daughters, sisters, aunts, cousins or their representatives, in this case they shall all inherit, and these coheirs are then called *coparceners*, or, for brevity, *parceners* only. Parceners by particular custom are where lands descend, as in gavelkind, to all the males in equal degree, as sons, brothers, uncles, &c. And in either of these cases all the parceners put together make but one heir, and have but one estate among them.

The properties of parceners are in some respects like those of joint-tenants, they having the same unities of *interest*, *title*, and *possession*. [188] They may sue and be sued jointly for matters relating to their own lands, and the entry of one of them shall in some cases inure as the entry of them all. They cannot have an action of trespass against each other. But herein they differ from joint-tenants, that they are also excluded from maintaining an action of waste; for coparceners could at all times put a stop to any waste by writ of partition, but till the statute of Henry VIII. joint-tenants had no such power. Parceners also differ materially from joint-tenants in four other points. 1. They always claim by descent, whereas joint-tenants always claim by purchase. And hence no lands can be held in coparcenery but estates of inheritance which are of a descendible nature; whereas not only estates in fee and in tail, but for life or years, may be held in joint-tenancy. 2. There is no unity of *time* necessary to an estate in coparcenary. For if a man had two daughters to whom his estate descends in coparcenary, and one dies before the other, the surviving daughter and the heir of the other, or when both are dead their two heirs are still parceners, the estates vesting in each of them at different times, though it be the same quantity of interest and held by the same title. 3. Parceners, though they have an *unity*, have not an *entirety* of interest. They are properly entitled each to the whole of a distinct moiety, and of course there is no *jus accrescendi*, or survivorship, between them, for each part descends severally to their respective heirs, though the unity of possession continues. And as long as the lands continue in a course of descent and united in possession, so long are the tenants therein, whether male or female, called parceners. But if the possession be once severed by partition, they are no longer parceners, but tenants in severalty; or if one parcener alienes her share, though no partition be made, then are the lands no longer held in *coparcenary*, but in *common*. [189]

The estate in coparcenary may be **dissolved** either by partition, which disunites the possession; by alienation of one parcener, which disunites the title and may disunite the interest; or by the whole at last descend-

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Prop., 336, 337. In some states this estate has been abolished by statute and co-heirs take as tenants in common. Id., citing 1 Stim. Am. Stat. Law, § 1375A.

ing to and vesting in one single person, which brings it to an estate in severalty. [191]

IV. **Tenants in common** are such as hold by several and distinct titles, but by unity of possession, because none knoweth his own severalty, and therefore they all occupy promiscuously.[8] This tenancy, therefore, happens where there is a unity of possession merely but perhaps an entire disunion of interest, of title, and of time. For if there be two tenants in common of lands, one may hold his part in fee-simple, the other in tail or for life, so that there is no necessary unity of interest. One may hold by descent, the other by purchase; or the one by purchase from A, the other by purchase from B; so that there is no unity of title. One's estate may have been vested fifty years, the other's but yesterday; so there is no unity of time. [192] **The only unity there is, is that of possession,** and for this Littleton gives the true reason, because no man can certainly tell which part is his own; otherwise even this would be soon destroyed.

Tenancy in common may be created either by the destruction of the two other estates in joint-tenancy and coparcenary, or by special limitation in a deed.[9] **By the destruction of the two other estates,** I mean such destruction as does not sever the unity of possession, but only the unity of title or interest. As if one of two joint-tenants in fee alienes his estate for the life of the alienee, the alienee and the other joint-tenants are tenants in common, for they have now several titles, the other joint-tenant by the origiginal grant, the alienee by the new alienation; and they also have several interests, the former joint-tenant in fee-simple, the alienee for his own life only. So if one joint-tenant gives his part to A in tail and the other gives his to B in tail, the donees are tenants in common as holding by different titles and conveyances. If one of two parceners alienes, the alienee and the remaining parcener are

8. Hopkins, Real Prop., 335.

9. This was the common law rule; but the converse is generally the case now in this country. See *ante*, Joint Tenancy and note.

tenants in common, because they hold by different titles, the parcener by descent, the alienee by purchase. So likewise, if there be a grant to two *men* or two *women,* and the heirs of their bodies, here the grantees shall be joint-tenants of the life estate, but they shall have several inheritances; because they cannot possibly have one heir of their two bodies, as might have been the case had the limitation been to *a man and woman* and the heirs of their bodies begotten. And in this and the like cases, their issue shall be tenants in common, because they must claim by different titles, one as heir of A and the other as heir of B, and those two not titles by purchase but descent. [193] In short, whenever an estate in joint-tenancy or coparcenary is dissolved, so that there be no partition made, but the unity of possession continues, it is turned into a tenancy in common.

A tenancy in common may also be created **by express limitation in a deed.**[1] But here care must be taken not to insert words which imply a joint estate, and then if lands be given to two or more, and it be not joint-tenancy, it must be a tenancy in common. But the law is apt in its constructions to favor joint-tenancy rather than tenancy in common, because the divisible services issuing from land (as rent, &c.) are not divided, nor the entire services (as fealty) multiplied by joint-tenancy, as they must necessarily be upon a tenancy in common. Land given to two, to be holden the one moiety to one and the other moiety to the other, is an estate in common, and if one grants to another *half* his land, the grantor and grantee are also tenants in common, because, as has been before observed, joint-tenants do not take by distinct halves or moieties; and by such grants the division and severalty of the estate is so plainly expressed that it is impossible they should take a joint interest in the whole of the tenements. But a *devise* to two persons to hold *jointly and severally* is said to be a joint-tenancy, because that is necessarily implied in the word "jointly," the word "severally" perhaps only implying the power of partition. And an estate given to A and B, *equally to be divided* between them, though in *deeds* it hath

1. See *ante,* Joint Tenancy and note.

been said to be a joint-tenancy, — for it implies no more than the law has annexed to that estate, viz., divisibility, — yet in *wills* it is certainly a tenancy in common, because the devisor may be presumed to have meant what is most beneficial to both the devisees, though his meaning is imperfectly expressed. And this nicety in the wording of grants makes it the most usual, as well as the wafest way when a tenancy in common is meant to be created, to add express words of exclusion as well as description, and limit the estate to A and B to hold *as tenants in common, and not as joint-tenants*.[2] [194]

As to the incidents attending a tenancy in common, tenants in common (like joint-tenants) are compellable by the statutes of Henry VIII. and William III., before mentioned, to make **partition** of their lands, which they were not at common law. They properly take by distinct moieties, and have no entirety of interest, and therefore there is **no survivorship** between tenants in common. Their other incidents are such as merely arise from the unity of possession, and are therefore the same as appertain to joint-tenants merely upon that account: such as being liable to reciprocal actions of **waste**[3] and of **account**[4] by the statutes of Westm. 2, c. 22, and 4 Anne, c. 16. For by the common law no tenant in common was liable to account with his companion for embezzling the profits of the estate, though if one actually turns the other out of possession, an action of **ejectment**[5] will lie against him. But as for other incidents of joint-tenants which arise from the privity of title or the union and entirety of interest (such as joining or being joined in actions, unless in the case where some entire or indivisible thing is to be recovered), these are not applicable to tenants in common, whose interests are distinct and whose titles are not joint, but several.

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2. In order to limit a joint tenancy in most of the states, use the words "to hold as joint tenants and not as tenants in common;" but first consult the statutes. See Hopkins, Real Prop., 335, 336.

3. See *ante*, Waste.

4. This action is still in use in Illinois. Rev. Stat. Ill., ch. 2.

5. The common law actions will be treated later on.

Estates in common can only be dissolved two ways: 1. By uniting all the titles and interests in one tenant, by purchase or otherwise, which brings the whole to one severalty. 2. By making partition between the several tenants in common, which gives them all respective severalties. For, indeed, tenancies in common differ in nothing from sole estates, but merely in the blending and unity of possession. And this finishes our inquiries with respect to the nature of *estates*.

CHAPTER XIII.

OF THE TITLE TO THINGS REAL, IN GENERAL.

A title is thus defined by Sir Edward Coke: *Titulus est justa causa possidendi id quod nostrum est;* or, it is the means whereby the owner of lands hath the just possession of his property. [195]

There are several stages or degrees requisite to form a complete title to lands and tenements. We will consider them in a progressive order.

I. **The lowest and most imperfect degree of title consists in the mere naked possession**, or actual occupation of the estate, without any apparent right, or any shadow or pretence of right, to hold and continue such possession.[1] This may happen when one man invades the possession of another, and by force or surprise turns him out of the occupation of his lands, which is termed a *disseisin,* being a deprivation of that actual seisin or corporal freehold of the lands which the tenant before enjoyed. Or it may happen that after the death of the ancestor and before the entry of the heir, or after the death of a particular tenant and before the entry of him in remainder or reversion, a stranger may contrive to get possession of the vacant land and hold out him that had a right to enter. [196] In the meantime, till some act be done by the *rightful* owner to devest

1. Mere possession will prevail everywhere as against a wrongdoer without title. And this is true both as to real and personal property. See the leading case of Armory v. Delamire, 1 Strange, 504; 1 Smith's Lead. Cases (9th Am. Ed.), 631 and notes.

In order to complete a possession two things are necessary: First, an occupancy, apprehension or taking, and, secondly, that the taking be with an intent to possess (*animus possidendi*); hence persons who have no legal will are said not to be capable of acquiring possession. See 2 Bouvier Law Dict. Possession and authorities cited. It s doubtful whether this statement is correct in its fullest extent, for an infant of sufficient understanding may lawfully acquire the possession of a thing. Id. The so-called Torrens system has been adopted in Illinois and quite a number of other states. See the report of the committee on the Torrens system in the proceedings of the sixth annual meeting of the Colorado Bar Association, July, 1903.

this possession and assert his title, such actual possession is, *prima facie*, evidence of a legal title in the possessor, and it may, *by length of time* and negligence of him who hath the right, by degrees ripen into a perfect and indefeasible title. And at all events, without such actual possession no title can be completely good.

II. **The next step to a good and perfect title is the right of possession**, which may reside in one man, while the actual possession is not in himself, but in another. For if a man be disseised, or otherwise kept out of possession by any of the means before mentioned, though the *actual* possession be lost, yet he has still remaining in him the *right* of possession, and may exert it whenever he thinks proper by entering upon the disseisor and turning him out of that occupancy which he has so illegally gained. But this right of possession is of two sorts: an *apparent* right of possession, which may be defeated by proving a better, and an *actual* right of possession, which will stand the test against all opponents. Thus if the disseisor or other wrong-doer dies possessed of the land whereof he so became seized by his own unlawful act, and the same descends to his heir, now by the common law the heir hath obtained an *apparent* right, though the *actual* right of possession resides in the person disseised, and it shall not be lawful for the person disseised to devest this apparent right by mere entry or other act of his own, but only by an action at law [*i. e.* a *real* action, which is now obsolete]. But if he who has the actual right of possession puts in his claim and brings his action within a reasonable time, and can prove by what unlawful means the ancestor became seised, he will then by sentence of law recover that possession to which he hath such actual right. [197] Yet, if he omits to bring this his possessory action within a competent time, his adversary may imperceptibly gain an actual right of possession in consequence of the other's negligence. And by this and certain other means the party kept out of possession may have nothing left in him but what we are next to speak of, viz.:—

III. **The mere right of property, the *jus proprietatis*,**

without either possession or even the right of possession. This is frequently spoken of in our books under the name of the *mere right, jus merum,* and the estate of the owner is in such cases said to be totally devested and *put to a right.*[2]

A person in this situation may have the true ultimate property of the lands in himself, but by the intervention of certain circumstances, either by his own negligence, the solemn act of his ancestor, or the determination of a court of justice, the presumptive evidence of that right is strongly in favor of his antagonist, who has thereby obtained the absolute right of possession. As, in the first place, if a person disseised, or turned out of possession of his estate, neglects to pursue his remedy within the time limited by law, by this means the disseisor or his heirs gain the actual right of possession; for the law presumes that either he had a good right originally, in virtue of which he entered on the lands in question, or that since such his entry he has procured a sufficient title, and therefore, after so long an acquiescence, the law will not suffer his possession to be disturbed without inquiring into the absolute right of property. [198] Yet still, if the person disseised or his heir hath the true right of property remaining in himself, his estate is indeed said to be turned into a mere right, but, by proving such his better right, he may at length recover the lands. Again, if a tenant in tail discontinues his estate-tail by alienating the lands to a stranger in fee, and dies, here the issue in tail hath no right of *possession,* independent of the right of *property;* for the law presumes *prima facie* that the ancestor would not disinherit or attempt to disinherit his heirs unless he had power so to do, and therefore, as the ancestor had in himself the right of possession, and has transferred the same to a stranger, the law will not permit that possession now to be disturbed, unless by showing the absolute right of property to reside in another person. The heir therefore in this case has only a *mere right,* and must be strictly held to the proof of it, in order to recover the lands. Lastly, if by accident, neglect, or otherwise, judgment is given for either party in any *possessory* action (that is, such wherein the right of possession only, and not that of property is contested), and the other party hath indeed in himself the right of property, this is now turned to a *mere right,* and upon proof thereof in a subsequent action, denominated a writ of right, he shall recover his seisin of the lands.

Thus, if a disseisor turns me out of possession of my lands, he thereby gains a *mere naked possession,* and I still retain the *right of possession* and *right of property.* If the disseisor dies and the lands descend to his son,

2. See Stat. 3 & 4 Wm. IV., c. 27. Real actions, by which alone this mere right as distinguished from the right to possession could be vindicated, having been abolished, this distinction is no longer important.

the son gains an *apparent* right of *possession;* but I still retain the *actual* right both of *possession* and *property.* If I acquiesce for thirty years without bringing any action to recover possession of the lands, the son gains the *actual right of possession,* and I retain nothing but the *mere right of property.* [199] And even this right of property will fail, or at least it will be without a remedy, unless I pursue it within the space of *sixty* years. So also if the father be tenant in tail and alienes the estate-tail to a stranger in fee, the alienee thereby gains the *right of possession,* and the son hath only the *mere right* or *right of property.* And hence it will follow that one man may have the *possession,* another the *right of possession,* and a third the *right of property.* For if a tenant in tail infeoffs A in fee-semple and dies, and B disseises A, now B will have the *possession,* A the *right of possession,* and the issue in tail the *right of property:* A may recover the possession against B, and afterwards the issue in tail may evict A, and unite in himself the possession, the right of possession, and also the right of property. In which union consists:—

IV. **A complete title to lands, tenements, and hereditaments.** For it is an ancient maxim of the law that no title is completely good unless the right of possession be joined with the right of property, which right is then denominated a double right, *jus duplicatum,* or *droit droit.* And when to this double right the actual possession is also united, there is, according to the expression of Fleta, *juris et seisinae conjunctio,*[3] then, and then only, is the title completely legal.[4]

3. A joining of right and seisin.

4. Possession and right of possession are now in any case sufficient to maintain an action. Possession may be actual or constructive. "If one occupies part of a known description of land, but has color of title to the whole and claims the whole, he has constructively possession of the whole, provided no one else is occupying any portion thereof." Cooley on Torts (Students' Ed., 1907), 316 and cases cited. The statutes of forcible entry and detainer in the several states should be consulted upon the subject of entry.

CHAPTER XIV.

OF TITLE BY DESCENT.

The methods of acquiring and of losing a title to estates in things real are reduced by our law to two: **descent**, where the title is vested in a man by the single operation of law, and **purchase**, where the title is vested in him by his own act or agreement.[1] [201]

Descent or hereditary succession is the title whereby a man on the death of his ancestor acquires his estate by right of representation, as his heir at law. An heir, therefore, is he upon whom the law casts the estate immediately on the death of the ancestor, and an estate so descending to the heir is in law called the inheritance.

As *the common law doctrine of inheritance* depends not a little on the nature of kindred and the several degrees of consanguinity, it will be previously necessary to state, as briefly as possible, the true notion of this kindred or alliance in blood. [202]

Consanguinity, or kindred, is defined by the writers on these subjects, to be "*vinculum personarum ab eodem stipite descendentium,*" the connection or relation of persons descended from the same stock or common ancestor. This consanguinity is either lineal or collateral.

Lineal consanguinity is that which subsists between persons, of whom one is descended in a direct line from the other, as between John Stiles and his father, grandfather, great-grandfather, and so upwards in the direct ascending line, or between John Stiles and his son, grandson, great-grandson, and so downwards in the direct descending line. [203] Every generation in this lineal direct consanguinity constitutes a different **degree**, reckoning either upwards or downwards. The father of John Stiles is related to him

1. Hopkins, Real Prop., 399. A state may acquire title (a) by discovery, conquest and treaty; (b) by confiscation and escheat; (c) by the right of eminent domain; and (d) by ordinary transfer from individuals: (e) or by forfeiture to the state for nonpayment of taxes in some states. Id.

in the first degree, and so likewise is his son; his grandsire and grandson in the second; his great-grandsire and great-grandson in the third. This is the only **natural way of reckoning the degrees in the direct line**, and therefore universally obtains, as well in the civil and canon as in the common law.

Collateral kindred agree with the lineal in this, that they descend from the same stock or ancestor, but differ in this, that they do not descend one from the other. [204] Collateral kinsmen are such then as lineally spring from one and the same ancestor, who is the *stirps*, or root, the *stipes*, trunk, or common stock, from whence these relations are branched out. As if John Stiles hath two sons, who have a numerous issue: both these issues are lienally descended from John Stiles as their common ancestor, and they are collateral kinsmen to each other, because they are all descended from this common ancestor, and all have a portion of his blood in their veins, which denominates them *consanguineos*. [205]

The method of computing degrees of collateral consanguinity in the canon law, which our law has adopted, is as follows: We begin at the common ancestor and reckon downwards, and in whatever degree the two persons or the most remote of them is distant from the common ancestor, that is the degree in which they are related to each other. [206] Thus *Titius* and his brother are related in the first degree, for from the father to each of them is counted only one; *Titius* and his nephew are related in the second degree, for the nephew is two degrees removed from the common ancestor, viz., his own grandfather, the father of *Titius*. [207] **The civilians count upwards, from either of the persons related, to the common stock, and then downwards again to the other**, reckoning a degree for each person both ascending and descending.[2]

I. **The first rule or canon of inheritance is, that inherit-**

2. The mode of the civil law is preferable for it points out the actual degree of kindred in all cases. 1 Bouvier Law Dict. Consanguinity. In most of the states the civil law rule of reckoning has been adopted. Hopkins, Real Prop., 484.

ances shall lineally descend to the issue of the person who last died actually seised in infinitum,[3] **but shall never lineally ascend.**[4] [208]

To explain the more clearly both this and the subsequent rules, it must first be observed that by law no inheritance can vest, nor can any person be the actual complete heir of another, till the ancestor is previously dead. *Nemo est haeres viventis.* Before that time the person who is next in the line of succession is called an *heir apparent,* or heir *presumptive.* **Heirs apparent** are such whose right of inheritance is indefeasible, provided they outlive the ancesor, as the eldest son or his issue, who must by the course of the common law be heir to the father whenever he happens to die. **Heirs presumptive** are such who, if the ancestor should die immediately, would in the present circumstances of things be his heirs, but whose right of inheritance may be defeated by the contingency of some nearer heir being born, — as a brother or nephew, whose presumptive succession may be destroyed by the birth of a child; or a daughter, whose present hopes may be hereafter cut off by the birth of a son. Nay, even if the estate hath descended, by the death of the owner, to such brother or nephew or daughter, in the former cases the estate shall be devested and taken away by the birth of a **posthumous child,** and in the latter it shall also be totally devested by the birth of a posthumous son.

We must also remember that no person can be properly such an ancestor as that an inheritance of lands or tene-

3. To infinity.

4. This rule has been changed by statute both in England and the United States, and persons in the ascending line are in certain cases permitted to inherit. Consult 3 & 4 Wm. IV., ch. 106; Hopkins, Real Prop., 482; Broom's Leg. Max., *469; and the local statutes of the several states.

The maxim *non jus sed seisina facit stipitem,* not the right but the seisin constitutes the stock from which the inheritance must descend, was also changed by the statute of William IV., which constitutes the last purchaser, and not the person last seised the person from whom the descent shall be traced. See Broom, Leg. Max., *467, 468, 469. The same rules prevail in this country. See the local statutes. Livery of seisin is obsolete and has been abolished by statute in probably most of the states. See Rev. Stat. Ill., ch. 30, sec. 1.

ments can be derived from him, unless he hath had **actual seisin** of such lands, either by his own entry or by the possession of his own or his ancestor's lessee for years, or by receiving rent from a lessee of a freehold; or unless he hath had what is equivalent to corporal seisin in hereditaments that are incorporeal. [209] But he shall not be accounted an ancestor who hath had only a bare right or title to enter or be otherwise seised.

II. **A second general rule or canon is, that the male issue shall be admitted before the female.**[5] [212] But our law does not extend to a total exclusion of females, as the Salic law and others, where feuds were most strictly retained, it only postpones them to males, for though daughters are excluded by sons, yet they succeed before any collateral relations. [214]

III. **A third rule or canon of descent is this: that where there are two or more males in equal degree, the eldest only shall inherit, but the females all together.**[6]

However, the succession by primogeniture, even among females, took place as to the **inheritance of the crown,** wherein the necessity of a sole and determinate succession is as great in the one sex as the other. [216] And the right of sole succession, though not of primogeniture, was also established with respect to female dignities and titles of honor. For if a man holds an earldom to him and the heirs of his body, and dies, leaving only daughters, the eldest shall not of course be countess, but the dignity is in suspense or abeyance till the king shall declare his pleasure; for he, being the fountain of honor, may confer it on which of them he pleases.

IV. **A fourth rule or canon of descents is this: that the lineal descendants, in infinitum, of any person deceased shall represent their ancestor;** that is, shall stand in the same place as the person himself would have done had he been living. [217]

Thus the child, grandchild, or great-grandchild (either male or female), of the eldest son succeeds before the

5. In this country, males and females inherit equally, but the male issue are still preferred in England. See Hopkins, Real Prop., 482.

6. Primogeniture does not prevail in this country. Hopkins, Real Prop., 483.

younger son, and so *in infinitum;* and these representatives shall take neither more nor less, but just so much as their principals would have done. This taking by representation is called succession *in stirpes,* according to the roots, since all the branches inherit the same share that their root, whom they represent, would have done.[7] Among these several issues or representatives of the respective roots, the same preference to males and the same right of primogeniture obtain as would have obtained at the first among the roots themselves, the sons or daughters of the deceased. [218]

V. **A fifth rule is, that on failure of lineal descendants or issue of the person last seised, the inheritance shall descend to his collateral relations being of the blood of the first purchaser, subject to the three preceding rules.**[8]

Thus if Geoffrey Stiles purchases land, and it descends to John Stiles his son, and John dies seised thereof without issue, whoever succeeds to this inheritance must be of the blood of Geoffrey, the first purchaser of this family. The first purchaser, *perquisitor,* is he who first acquired the estate to his family, whether the same was transferred to him by sale or by gift, or by any other method, except only that of descent.

When feuds first began to be hereditary, it was made a necessary qualification of the heir who would succeed to a feud that he should be of the blood of, that is, lineally descended from, the first feudatory or purchaser. [221] In consequence whereof, if a vassal died seised of a feud of his own acquiring, or *feudum novum,*[9] it could not descend to any but his own offspring, no, not even to his brother, because he was not descended nor derived his blood from the first acquirer. But if it was *feudum antiquum,*[1] that is, one descended to the vassal from his ancestors, then his

7. In some of the states the heirs take *per stirpes* and in others *per capita,* that is, share and share alike. Hopkins, Real Prop., 483; 1 Stim. Am. St. Law, § 3137.

8. The statutes on this subject are diverse and each state is a law unto itself. Statutes have no extra-territorial force and the laws of descent are strictly local and must be consulted in every case.

9. A new feud.

1. An old feud.

brother, or such other collateral relation as was descended and derived his blood from the first feudatory, might succeed to such inheritance. However, in process of time, when the feodal rigor was in part abated, a method was invented to let in the collateral relations of the grantee to the inheritance by granting him a *feudum novum* to hold *ut feudum antiquum,* that is, with all the qualities annexed of a feud derived from his ancestors, and then the collateral relations were admitted to succeed even *in infinitum,* because they might have been of the blood of, that is, descended from, the first imaginary purchaser.

Of this nature are all the grants of fee-simple estates of this kingdom, for there is now in the law of England no such thing as a grant of a *feudum novum* to be held *ut novum,* unless in the case of a fee-tail, and there we see that this rule is strictly observed, and none but the lineal descendants of the first donee (or purchaser) are admitted. But *every grant of lands in fee-simple is with us a feudum novum to be held ut antiquum, as a feud whose antiquity is indefinite,* and therefore the collateral kindred of the grantee, or descendants from any of his lineal ancestors, by whom the lands might have possibly been purchased, are capable of being called to the inheritance. [222]

Yet when an estate hath *really descended* in a course of inheritance to the person last seised, the strict rule of the feodal law is still observed, and none are admitted but the heirs of those through whom the inheritance hath passed, for all others have demonstrably none of the blood of the first purchaser in them, and therefore shall never succeed. As, if lands come to John Stiles by descent from his mother, Lucy Baker, no relation of his father (as such) shall ever be his heir of these lands. And *vice versa,* if they descended from his father, Geoffrey Stiles, no relation of his mother (as such) shall ever be admitted thereto, for his father's kindred have none of his mother's blood, nor have his mother's relations any share of his father's blood.

Here we may observe that so far as the feud is really *antiquum,* the law traces it back, and will not suffer any to inherit but the blood of those ancestors from whom the

feud was conveyed to the late proprietor. [223] But when, through length of time, it can trace it no farther, as if it be not known whether his grandfather, George Stiles, inherited it from his father, Walter Stiles, or his mother, Christian Smith, or if it appear that his grandfather was the first grantee, and so took it, by the general law, as a feud of indefinite antiquity,— in either of these cases the law admits the descendants of any ancestor of George Stiles, either paternal or maternal, to be in their due order the heirs to John Stiles of this estate; because in the first case it is really uncertain, and in the second case it is supposed to be uncertain, whether the grandfather derived his title from the part of his father or his mother.

This, then, is the great and general principle upon which the law of collateral inheritance depends: that, upon failure of issue in the last proprietor, the estate shall descend to the blood of the first purchaser; or, that it shall result back to the heirs of the body of that ancestor from whom it either really has, or is supposed by fiction of law to have originally descended.[2]

The rules of inheritance that remain are only rules of evidence calculated to investigate who the purchasing ancestor was, which *in feudis vere antiquis*[3] has, in process of time, been forgotten, and is supposed so to be in feuds that are held *ut antiquis*.[4] [224]

VI. **A sixth rule or canon, therefore, is, that the collateral heir of the person last seised must be his next collateral kinsman of the whole blood.**[5]

First, he must be his next collateral kinsman, either personally or *jure representation is*,[6] which proximity is reckoned according to the canonical degrees of consanguinity before mentioned.

The right of representation being thus established, the

2. See, as to ancestral lands, Hopkins, Real Prop., 484, 485.

3. In feuds really ancient.

4. As ancient.

5. By whole blood is meant that the heir and the intestate are descendants from the same pair of ancestors. Hopkins, Real Prop., 485. This rule has been changed in most, if not all, of the states. Hopkins, Real Prop.; 1 Stim. Am. Stat. Law, § 3133.

6. By right of representation.

former part of the present rule amounts to this: that on failure of issue of the person last seised, the inheritance shall descend to the other subsisting issue of his next immediate ancestor. [225] Thus, if John Stiles dies without issue, his estate shall descend to Francis his brother or his representatives, he being lineally descended from Geoffrey Stiles, John's next immediate ancestor, or father. On failure of brethren or sisters and their issue, it shall descend to the uncle of John Stiles, the lineal descendant of his grandfather George, and so on *in infinitum*. But though the common ancestor be thus the root of the inheritance, yet with us it is not necessary to *name* him in making out the pedigree or descent. [226] For the descent between two brothers is held to be an *immediate* descent, and therefore title may be made by one brother or his representatives *to* or *through* another without mentioning their common father. But though the common ancestors are not named in deducing the pedigree, yet the law still respects them as the fountains of inheritable blood; and, therefore, in order to ascertain the collateral heir of John Stiles, it is first necessary to recur to his ancestors in the first degree, and if they have left any other issue besides John, that issue will be his heir. On default of such, we must ascend one step higher, to the ancestors in the second degree, and then to those in the third and fourth, and so upwards *in infinitum*, till some couple of ancestors be found who have other issue descending from them besides the deceased in a parallel or collateral line. From these ancestors the heir of John Stiles must derive his descent, and in such derivation the same rules must be observed with regard to the sex, primogeniture, and representation, that have before been laid down with regard to lineal descents from the person of the last proprietor. [227]

But, secondly, the heir need not be the nearest kinsman absolutely, but only *sub modo*;[7] that is, he must be the nearest kinsman of the *whole* blood; for if there be a much nearer kinsman of the *half* blood, a distant kinsman of the whole blood shall be admitted, and the other entirely ex-

7. In a manner.

cluded; nay, the estate shall escheat to the lord sooner than the half blood shall inherit. A kinsman of the whole blood is he that is derived, not only from the same ancestor, but from the same couple of ancestors. [See Maine's Anc. Law, 146.]

By our law as it now stands, the crown—which is the highest inheritance in the nation—may descend to the half blood of the preceding sovereign, so that it be the blood of the first monarch purchaser, or, in the feodal language, conqueror of the reigning family. [233] Also in estates tail, where the pedigree from the first donee must be strictly proved, half blood is no impediment to the descent.

VII. **The seventh and last rule or canon is, that in collateral inheritances the male stocks shall be preferred to the female,— that is, kindred derived from the blood of the male ancestors, however remote, shall be admitted before those from the blood of the female, however near,— unless where the lands have in fact descended from a female.**[8] [234]

8. Not the law in the United States. Hopkins, Real Prop., 485.

CHAPTER XV.

OF TITLE BY PURCHASE; AND, I. BY ESCHEAT.

Purchase (perquisitio), taken in its largest and most extensive sense, is thus defined by Littleton: the possession of lands and tenements, which a man hath by his own act or agreement, and not by descent from any of his ancestors or kindred. [241] In this sense it is contradistinguished from acquisition by right of blood, and includes every other method of coming to an estate but merely that by inheritance; wherein the title is vested in a person, not by his own act or agreement, but by the single operation of law.

If I *give* land freely to another, he is in the eye of the law a purchaser. A man who has his father's estate settled upon him in tail before he was born is also a purchaser, for he takes quite another estate than the law of descents would have given him. Nay, even if the ancestor devises his estate to his heir-at-law by will *with* other limitations, *or* in any other shape than the course of descents would direct, such heir shall take by purchase. But if a man, seised in fee, devises his whole estate to his heir-at-law, so that the heir takes neither a greater nor a less estate by the devise than he would have done without it, he shall be adjudged to take by descent, even though it be charged with incumbrances; this being for the benefit of creditors and others who have demands on the estate of the ancestor. [242] If a remainder be limited to the heirs of Sempronius, here Sempronius himself takes nothing; but if he dies during the continuance of the particular estate, his heirs shall take as purchasers. But if an estate be made to A for life, remainder to his right heirs in fee, his heirs shall take by descent; for it is an ancient rule of law that whenever the ancestor takes an estate for life the heir cannot by the same conveyance take an estate in fee by *purchase,* but only by *descent.* And if A dies before entry, still his heirs shall take by descent and not by purchase; for where the heir takes anything that might have vested in the ancestor,

he takes by way of descent. The ancestor during his life beareth in himself all his heirs, and therefore, when once he is or might have been seised of the lands, the inheritance so limited to his heirs vests in the ancestor himself; and the word "heirs" in this case is not esteemed a word of *purchase* but a word of *limitation,* inuring so as to increase the estate of the ancestor from a tenancy for life to a fee-simple.[1]

The difference in effect between the acquisition of an estate by descent and by purchase, consists principally in these two points: 1. That **by purchase the estate acquires a new inheritable quality,** and is descendibl to the owner's blood in general, and not the blood only of some particular ancestor. [243] For when a man takes an estate by purchase, he takes it not *ut feudum paternum* or *maternum,*[2] which would descend only to the heirs by the father's or the mother's side, but he takes it *ut feudum antiquum,*[3] as a feud of indefinite antiquity, whereby it becomes inheritable to his heirs general, first of the paternal and then of the maternal line. 2. **An estate taken by purchase will not make the heir answerable for the acts of the ancestor** as an estate by descent will. For if the ancestor, by any deed, obligation, covenant, or the like, bindeth himself and his heirs and dieth, this deed, obligation, or covenant shall be binding upon the heir, so far forth only as he (or any other in trust for him) had any estate of inheritance vested in him by descent from (or any estate *pur auter vie*[4] coming to him by special occupancy as heir to) that ancestor sufficient to answer the charge, whether he remains in possession or hath alienated it before action brought, which sufficient

1. This is the celebrated rule in Shelley's Case, 1 Rep. 98. In some of the states it is still the law; in others it has been abolished. The rule may be formulated as follows: Where an estate of freehold is limited to a person and by the same conveyance an estate in form, a remainder is given either mediately or immediately to his heirs or the heirs of his body, the word "heirs" is a word of limitation and not of purchase. See Hopkins, Real Prop., 295-298, for a detailed explanation. In Illinois it is held that the rule yields to the intention of the donor or testator when clearly expressed in the instrument. Belslay v. Eagel, 107 Ill. 182; Griswold v. Hicks, 132 id. 494.

2. As a fee paternal or maternal.

3. As an ancient fee.

4. For the life of another.

estate is in the law called **assets**, from the French word *assez*, enough. [244] Therefore, if a man covenants for himself and his heirs to keep my house in repair, I can then (and then only) compel his heir to perform this covenant when he has an estate sufficient for this purpose, or *assets* by descent from the covenantor; for though the covenant descends to the heir whether he inherits any estate or no, it lies dormant, and is not compulsory until he has assets by descent.

This being the legal signification of the word purchase, in this sense it includes the five following methods of acquiring a title to estates: 1. Escheat. 2. Occupancy. 3. Prescription. 4. Forfeiture. 5. Alienation.

I. **Escheat** was one of the fruits and consequences of feodal tenure. The word itself is originally French or Norman, in which language it signifies chance or accident; and with us it denotes an obstruction of the course of descent, and a consequent determination of the tenure by some unforeseen contingency, in which case the land naturally results back by a kind of reversion to the original grantor or lord of the fee.[5]

In order to complete this title by escheat, it is necessary that the lord perform an act of his own, by *entering* on the lands and tenements so escheated, or suing out a *writ of escheat*, on failure of which, or by doing any act that amounts to an implied waiver of his right, as by accepting homage or rent of a stranger who usurps the possession, his title by escheat is barred. [245] It is therefore in some respect a title acquired by his own act, as well as by act of law.

The law of escheats is founded upon this single principle, that the blood of the person last seized in fee-simple is, by some means or other, utterly extinct and gone; and, since none can inherit his estate but such as are of his blood and consanguinity, it follows as a regular consequence that

5. With us the land in default of heirs escheats to the state. Hopkins, Real Prop., 485, 486; 1 Stim. Am. Stat. Law, §§ 1151, 3125. In Illinois real and personal estate escheat to the county in which the property is situated. Rev. Stat. Ill., ch. 49, sec. 1. Prior to the Act of 1874 it escheated to the state.

when such blood is extinct, the inheritance itself must fail; the land must become what the feodal writers denominate *feudum apertum*,[6] and must result back again to the lord of the fee, by whom, or by those whose estate he hath, it was given.

Escheats are frequently divided into those **propter defectum sanguinis**,[7] and those **propter delictum tenentis**,[8] the one sort if the tenant dies without heirs; the other, if his blood be attainted. But both these species may well be comprehended under the first denomination only, for he that is attainted suffers an extinction of his blood as well as he that dies without relations. [246] The inheritable quality is expunged in one instance, and expires in the other.

Escheats, therefore, arising merely upon the deficiency of the blood, whereby the descent is impeded, their doctrine will be better illustrated by considering the several **cases wherein hereditary blood may be deficient**, than by any other method whatsover.

1, 2, 3. First, **when the tenant dies without any relations** on the part of any of his ancestors; secondly, when he dies without any relations on the part of those ancestors from whom his estate descended; thirdly, when he dies without any relations of the whole blood.

4. **A monster**, which hath not the shape of mankind, but in any part evidently bears the resemblance of the brute creation, hath no inheritable blood, and cannot be heir to any land, albeit it be brought forth in marriage; but, although it hath deformity in any part of its body, yet if it hath human shape it may be heir. Our law will not admit a birth of this kind to be such an issue as shall entitle the husband to be tenant by the curtesy, because it is not capable of inheriting. And, therefore, if there appears no other heir than such a prodigious birth, the land shall escheat to the lord.[9] [247]

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6. An open fee.

7. On account of defect of blood.

8. On account of the crime of the tenant.

9. 2 Bouvier Law Dict. Monster; Ewell's Med. Jur. (2d Ed.), 177; Ogston, Med. Jur., 178; 2 Witthaus & Becker, Med. Jur., 392.

5. **Bastards are incapable of being heirs.**[1] Bastards, by our law, are such children as are not born either in lawful wedlock or within a competent time after its determination. Such are held to be *nullius filii*, the sons of nobody. Being thus the sons of nobody, they have no blood in them, at least no inheritable blood, consequently none of the blood of the first purchaser; and, therefore, if there be no other claimant than such illegitimate children, the land shall escheat to the lord.

There is, indeed, one instance in which our law has shown them some little regard, and that is usually termed the case of **Bastard eigne** and **mulier puisne.** This happens when a man has a bastard son and afterwards marries the mother, and by her has a legitimate son, who, in the language of the law, is called a *mulier*, or, as Glanvil expresses it in his Latin, *filius mulieratus*, the woman before marriage being *concubina*, and afterwards *mulier*. Now here the eldest son is bastard, or *bastard eigne*, and the younger son is legitimate, or *mulier puisne*. If then the father dies, and the *bastard eigne* enters upon his land and enjoys it to his death, and dies seised thereof, whereby the inheritance descends to his issue, in this case the *mulier puisne*, and all other heirs (though minors, feme-coverts, or under any incapacity whatsoever) are totally barred of their right.

As bastards cannot be heirs themselves, so neither can they have any heirs but those of their own bodies. [249] For as all collateral kindred consists in being derived from the same common ancestor, and a bastard has no legal ancestors, he can have no collateral kindred, and, consequently, can have no legal heirs but such as claim by a lineal descent from himself. And, therefore, if a bastard purchases land and dies seised thereof without issue and intestate, the land shall escheat to the lord of the fee.

6. **Aliens also are incapable of taking by descent,** or inheriting, for they are not allowed to have any inheritable blood in them.[2] Wherefore, if a man leaves no other relations but aliens, his land shall escheat to the lord.

1. This rule has been changed by statute in some of the states. See local statutes.

2. Changed by statute in this country. See local statutes and *ante*.

As aliens cannot inherit, so far they are on a level with bastards; but as they are also disabled to hold by purchase, they are under still greater disabilities. And as they can neither hold by purchase nor by inheritance, it is almost superfluous to say that they can have no heirs, since they can have nothing for an heir to inherit; but so it is expressly holden, because they have not in them any inheritable blood.

And further, if an alien be made a denizen by the king's letters-patent and then purchases lands (which the law allows such a one to do), his son, born before his denization, shall not (by the common law) inherit those lands, but a son born afterwards may, even though his elder brother be living; for the father, before denization, had no inheritable blood to communicate to his eldest son, but by denization it acquires an hereditary quality which will be transmitted to his subsequent posterity. Yet if he had been naturalized by act of parliament such *eldest son* might then have inherited, for that cancels all defects, and is allowed to have a *retrospective* energy, which simple *denization* has not.

It is now held for law, that the sons of an alien born here may inherit to each other, the descent from one brother to another being an *immediate* descent. [250]

7. **By attainder,** also, for treason or other felony, the blood of the person attainted is so corrupted as to be rendered no longer inheritable.[3] [251]

Great care must be taken to distinguish between forfeiture of lands to the king and this species of escheat to the lord. The doctrine of escheat upon attainder, taken singly, is this: that the blood of the tenant, by the commission of any felony (under which denomination all treasons were formerly comprised), is corrupted and stained, and the original donation of the feud is thereby determined, it being always granted to the vassal on the implied condition of *dum bene se gesserit.* [252] Upon the thorough demonstration of which guilt, by legal attainder, the feodal covenant and mutual bond of fealty are held to be broken, the estate instantly falls back from the offender to the lord of the fee, and the inheritable quality of his blood is extinguished and blotted out forever. In this situation the law of feodal escheat was brought into England at the Conquest, and in general superadded to the ancient law of forfeiture. In consequence of which corruption and extinction of hereditary blood, the land of all felons would immediately revest in the lord, but that the superior law of forfeiture intervenes, and intercepts it in its passage: in case of treason, forever; in case of other felony, for only a year and a day; after which time it goes to the lord in a regular course of escheat,

3. Not law in the United States. U. S. Const., art. 1, sec. 10; Cooley, Const. Lim. (7th Ed.), 36, 368.

as it would have done to the heir of the felon in case the feodal tenures had never been introduced.

Hitherto we have only spoken of estates vested in the offender at the time of his offence or attainder. [253] And here the law of forfeiture stops, but the law of escheat pursues the matter still farther. For the blood of the tenant being utterly corrupted and extinguished, it follows not only that all that he now has shall escheat from him, but also that he shall be incapable of inheriting anything for the future.

There is yet a further consequence of the corruption and extinction of hereditary blood, which is this: that the person attainted shall not only be incapable himself of inheriting, or transmitting his own property by heirship, but shall also obstruct the descent of lands or tenements to his posterity in all cases where they are obliged to derive their title through him from any remoter ancestor. [254]

This corruption of blood cannot be absolutely removed but by authority of parliament. The king may excuse the public punishment of an offender, but cannot abolish the private right which has accrued or may accrue to individuals as a consequence of the criminal's attainder. He may remit a forfeiture, in which the interest of the crown is alone concerned, but he cannot wipe away the corruption of blood; for therein a third person hath an interest, the lord who claims by escheat. If, therefore, a man hath a son and is attainted and afterwards pardoned by the king, this son can never inherit to his father or father's ancestors, because his paternal blood, being once thoroughly corrupted by his father's attainder, must continue so. But if the son had been born after the pardon, he might inherit, because by the pardon the father is made a new man, and may convey new inheritable blood to his after-born children.

Herein there is however a difference between aliens and persons attainted. Of aliens who could never by any possibility be heirs, the law takes no notice, and therefore we have seen that an alien elder brother shall not impede the descent to a natural-born younger brother. [255] But in attainders it is otherwise; for if a man hath issue a son, and is attainted and afterwards pardoned, and then hath issue a second son and dies, here the corruption of blood is not removed from the eldest, and therefore he cannot be heir; neither can the younger be heir, for he hath an elder brother living of whom the law takes notice, as he once had a possibility of being heir, and therefore the younger brother shall not inherit, but the land shall escheat to the lord; though had the elder died without issue in the life of the father, the younger son born after the pardon might well have inherited, for he hath no corruption of blood. So if a man hath issue two sons, and the elder in the lifetime of the father hath issue, and then is attainted and executed, and afterwards the father dies, the lands of the father shall not descend to the younger son, for the issue of the elder which had once a possibility to inherit shall impede the descent to the younger, and the land shall escheat to the lord.

There is one singular instance in which lands held in fee-simple are not liable to escheat to the lord, even when their owner is no more, and hath left no heirs to inherit them. And this is the case of a corporation, for if that comes by any accident to be dissolved, the donor or his heirs shall have the land again in reversion, and not the lord by escheat, which is perhaps the only instance where a reversion can be expectant on a grant in fee-simple absolute. But the law, we are told, doth tacitly annex a condition to every such gift or grant, that if the corporation be dissolved the donor or grantor shall re-enter, for the cause of the gift or grant faileth.[4] [257]

4. 2 Kent Com. 307; Co. Litt., 13b; Clark on Corp. (2d Ed.), 247. But as respects private business corporations, this is not the rule. A private corporation holds the legal title to its property in equity merely for the benefit of the stockholders and creditors. Clark on Corp. (2d Ed.), 248.

CHAPTER XVI.

II. OF TITLE BY OCCUPANCY.

Occupancy is the taking possession of those things which before belonged to nobody. This, as we have seen, is the true ground and foundation of all property, or of holding those things in severalty which, by the law of nature unqualified by that of society, were common to all mankind. [258]

This right of occupancy, so far as it concerns real property (for of personal chattels I am not in this place to speak), hath been confined by the laws of England within a very narrow compass, and was extended only to a single instance: namely, where a man was **tenant pur auter vie,**[1] or had an estate granted to himself only (without mentioning his heirs) for the life of another man, and died during the life of *cestuy que vie,* or him by whose life it was holden. In this case he that could first enter on the land might lawfully retain the possession, so long as *cestuy que vie* lived by right of occupancy. It did not revert to the grantor, though it formerly was supposed so to do, for he had parted with all his interest so long as *cestuy que vie* lived; it did not escheat to the lord of the fee, for all escheats must be of the absolute entire fee, and not of any particular estate carved out of it, much less of so minute a remnant as this; it did not belong to the grantee, for he was dead; it did not descend to his heirs, for there were no words of inheritance in the grant, nor could it vest in his executors, for no executors could succeed to a freehold. [259] Belonging, therefore, to nobody, like the *haereditas jacens*[2] of the Romans, the law left it open to be seised and appropriated by the first person that could enter upon it during the life of *cestuy que vie* under the name of an occupant. But there was no right of occupancy allowed where

1. For the life of another.

2. An inheritance that has failed or fallen.

the king had the reversion of the lands, for the reversioner hath an equal right with any other man to enter upon the vacant possession, and where the king's title and a subject's concur, the king's shall be always preferred. Against the king, therefore, there could be no prior occupant, because *nullum tempus occurrit regi.*[3] And even in the case of a subject, had the estate *pur auter vie* been granted to a man *and his heirs* during the life of *cestuy que vie,* there the heir might and still may enter and hold possession, and is called in law a **special occupant,** as having a special exclusive right, by the terms of the original grant, to enter upon and occupy this *haereditas jacens* during the residue of the estate granted.

But the title of common occupancy is now reduced almost to nothing by two statutes: the one 29 Car. II, c. 3, which enacts (according to the ancient rule of law) that where there is no special occupant in whom the estate may vest, the tenant *pur auter vie* may devise it by will, or it shall go to the executors or administrators, and be assets in their hand for payment of debts; the other that of 14 Geo. II. c. 20, which enacts that the surplus of such estate *pur auter vie,* after payment of debts, shall go in a course of distribution like a chattel interest. [260] **By these two statutes the title of common occupancy is utterly extinct and abolished; though that of special occupancy by the heir at law continues to this day,**[4] such heir being held to succeed to the ancestor's estate, not by descent, for then he must take an estate of inheritance, but as an occupant specially marked out and appointed by the original grant. But as before the statutes there could no common occupancy be had of incorporeal hereditaments, as of rents, tithes, advowsons, commons, or the like (because with respect to them there could be no actual entry made or corporal seisin had, and therefore by the death of the grantee *pur auter vie* a grant of such hereditaments was entirely determined), so now, I apprehend, notwithstanding these statutes, such grant would be deter-

3. No time bars the king.

4. See Rice's Modern Law of Real Prop., 136-138, and local statutes.

mined likewise, and the hereditaments would not be devisable, nor vest in the executors, nor go in a course of distribution.

In some cases where the laws of other nations give a right by occupancy, as in lands newly created by the rising of an island in the sea or in a river, or by the alluvion or dereliction of the waters, — in these instances the law of England assigns them an immediate owner. [261] For Bracton tells us that **if an island arise in the middle of a river,**[5] it belongs in common to those who have lands on each side thereof; but if it be nearer to one bank than the other, it belongs only to him who is proprietor of the nearest shore, which is agreeable to and probably copied from the civil law. However, **in case a new island rise in the sea,** though the civil law gives it to the first occupant, yet ours gives it to the king.[6] And as to lands gained from the sea, either by **alluvion,** by the washing up of sand and earth, so as in time to make *terra firma,* or by **dereliction,** as when the sea shrinks back below the usual watermark, — in these cases the law is held to be that if this gain be by little and little, by small and imperceptible degrees, it shall go to the owner of the land adjoining. [262] For *de minimis non curat lex.*[7] And besides, these owners being often losers by the breaking in of the sea, or at charges to keep it out, this possible gain is therefore a reciprocal consideration for such possible charge or loss. But if the alluvion or dereliction be sudden and considerable, in this case it belongs to the king, for as the king is lord of the sea, and so owner of the soil while it is covered with water, it is but reasonable he should have the soil when the water has left it dry. In the same manner, if a river running between two lordships by degrees gains upon the one, and thereby leaves the other

5. If the river be non-navigable in the common law sense, the adjacent proprietors would not be tenants in common, but in severalty of the respective portions on each side of the middle thread of the stream.

6. An island newly rising in the sea or one hitherto undiscovered, would belong to the nation first discovering and taking possession of it. As to the rights of riparian owners in general, see Cooley on Torts (Students' Ed.), 370; Black's Pomeroy on Rip. Rights (1893); Gould on Waters (1900); Farnham on Waters (1904), 3 vols.

7. The law cares not for trifles. Broom's Legal Maxims, *134.

dry, the owner who loses his ground thus imperceptibly has no remedy; but if the course of the river be changed by a sudden and violent flood, or other hasty means, and thereby a man loses his ground, it is said that he shall have what the river has left in any other place as a recompense for this sudden loss.

CHAPTER XVII.

III. OF TITLE BY PRESCRIPTION.

A third method of acquiring real property by purchase is that by prescription as when a man can show no other title to what he claims, than that he, and those under whom he claims, have immemorially used to enjoy it.[1] [263]

First, **the distinction between custom and prescription** is this: that custom is properly a *local* usage, and not annexed to a *person,* such as a custom in the manor of Dale that lands shall descend to the youngest son; prescription is merely a *personal* usage, as that Sempronius and his ancestors, or those whose estate he hath, have used time out of mind to have such an advantage or privilege.

All prescription must be either in a man and his ancestors or in a man and those whose estate he hath, which last is called prescribing in a *que estate.* [264] And formerly a man might, by the common law, have prescribed for a right which has been enjoyed by his ancestors or predecessors at any distance of time, though his or their enjoyment of it had been suspended for an indefinite series of years. But by the statute of limitations, 32 Hen. VIII. c. 2, it is enacted that no person shall make any prescription by the seisin or possession of his ancestor or predecessor unless such seisin or possession hath been within threescore years next before such prescription made.[2]

Secondly, **as to the several species of things which may or may not be prescribed for,** we may, in the first place, observe that nothing but incorporeal hereditaments can be claimed by prescription, — as a right of way, a common, &c., — but that no prescription can give a title to lands and

1. "The possession must have been *possessio longa, continua, et pacifica, nec sit legitim a interruptio;* long continued, peaceable and without lawful interruption." 2 Bouvier Law Dict. 371; Bract., 52, 222, 226; Co. Litt., 113b.

2. Twenty years is the time usually required and in some states even a less period is necessary. Hopkins, Real Prop.; 2 Bouvier Law Dict. 371. See the local statutes.

other corporeal substances of which more certain evidence may be had.[3] 2. A prescription must always be laid in him that is tenant of the fee. [265] A tenant for life, for years, at will, or a copyholder cannot prescribe, by reason of the imbecility of their estates. For, as prescription is usage beyond time of memory, it is absurd that they should pretend to prescribe for anything whose estates commenced within the remembrance of man. And therefore the copyholder must prescribe under cover of his lord's estate, and the tenant for life under cover of the tenant in fee-simple. 3. A prescription cannot be for a thing which cannot be raised by grant. For the law allows prescription only in supply of the loss of a grant, and therefore every prescription presupposes a grant to have existed. Thus the lord of a manor cannot prescribe to raise a tax or toll upon strangers, for, as such claim could never have been good by any grant, it shall not be good by prescription. 4. A fourth rule is, that what is to arise by matter of record cannot be prescribed for, but must be claimed by grant, entered on record; such as, for instance, the royal franchises of deodands, felons' goods, and the like. 5. Among things incorporeal which may be claimed by prescription, a distinction must be made with regard to the manner of prescribing: that is, whether a man shall prescribe in a *que estate,* or in himself and his ancestors. For if a man prescribes in a *que estate* (that is, in himself and those whose estate he holds), nothing is claimable by this prescription but such things as are incident, appendant, or appurtenant to lands. For it would be absurd to claim anything as the consequence or appendix of an estate, with which the thing claimed has no connection; but if he prescribes in himself and his ancestors, he may prescribe for anything whatsoever that lies in grant, not only things that are appurtenant, but also such as may be in gross. [266] Thus, a man may

3. By analogy to prescription statutes of limitation exist in all the states, by which title to corporeal hereditaments, as well as incorporeal, may be acquired by adverse possession for the statutory period which is usually fixed at twenty years, though a less period suffices in some states. See, generally, Wood on Limitation of Actions (1907); Buswell on Limitation of Actions (1889); 3 Wash. Real Prop. (6th Ed.) (1902).

prescribe in a *que estate* for a common *appurtenant* to a manor, but, if he would prescribe for a common *in gross,* he must prescribe in himself and his ancestors. 6. Lastly, we may observe that estates gained by prescription are not, of course, descendible to the heirs general, like other purchased estates, but are an exception to the rule. For, properly speaking, the prescription is rather to be considered as an evidence of a former acquisition than as an acquisition *de novo:* and therefore, if a man prescribes for a right of way in himself and his ancestors, it will descend only to the blood of that line of ancestors in whom he so prescribes, the prescription in this case being indeed a species of descent. But if he prescribes for it in a *que estate,* it will follow the nature of that estate in which the prescription is laid, and be inheritable in the same manner, whether that were acquired by descent or purchase; for every accessory followeth the nature of its principal.

CHAPTER XVIII.

IV. OF TITLE BY FORFEITURE.

Forfeiture is a punishment annexed by law to some illegal act or negligence, in the owner of lands, tenements, or hereditaments, whereby he loses all his interest therein, and they go to the party injured, as a recompense for the wrong which either he alone, or the public together with himself, hath sustained. [267]

Lands, tenements, and hereditaments may be forfeited in various degrees and by various means: 1. By crimes and misdemeanors. 2. By alienation contrary to law. 3. By non-representation to a benefice, when the forfeiture is denominated a *lapse*. 4. By simony. 5. By non-performance of condition. 6. By waste. 7. By breach of copyhold customs. 8. By bankruptcy.

I. **The foundation and justice of forfeitures for crimes and misdemeanors,** and the several degrees of those forfeitures proportioned to the several offences, will be more properly considered in the fourth book of these Commentaries.[1] At present I shall only observe that the offences which induce a forfeiture of lands and tenements to the crown are principally the following six: 1. Treason. 2. Felony. 3. Misprison of treason. 4. *Praemunire*. 5. Drawing a weapon on a judge, or striking any one in the presence of the king's principal courts of justice. [268] 6. Popish recusancy, or non-observance of certain laws enacted in restraint of papists.

II. **Lands and tenements may be forfeited by alienation, or conveying them to another contrary to law.** This is either alienation in *mortmain,* alienation to an *alien,* or alienation by *particular tenants;* in the two former of which cases the forefeiture arises from the incapacity of the alienee to take, in the latter from the incapacity of the alienor to grant.

1. **Alienation in mortmain,** *in mortua manu,* is an aliena-

1. See U. S. Const., art. 3, sec. 3, cl. 2; Cooley's Const. Lim. (7th Ed.), 368, and the several state constitutions by which such forfeitures have been abolished or greatly mitigated. See, also, 33 & 34 Vict., ch. 23.

tion of lands or tenements to any corporation, sole or aggregate, ecclesiastical or temporal.[2] But these purchases having been chiefly made by religious houses, in consequence whereof the lands became perpetually inherent in one dead hand, this hath occasioned the general appellation of mortmain to be applied to such alienations, and the religious houses themselves to be principally considered in forming the statutes of mortmain.

By the common law any man might dispose of his lands to any other private man at his own discretion, especially when the feodal restraints of alienation were worn away. Yet in consequence of these it was always, and is still, necessary for corporations to have a license in mortmain from the crown, to enable them to purchase lands; for as the king is the ultimate lord of every fee, he ought not, unless by his own consent, to lose his privilege of escheats and other feodal profits, by the vesting of lands in tenants that can never be attainted or die. [269] And such licenses of mortmain seem to have been necessary among the Saxons above sixty years before the Norman Conquest. But besides this general license from the king, as lord paramount of the kingdom, it was also requisite, whenever there was a mesne or intermediate lord between the king and the alienor, to obtain his license also (upon the same feodal principles) for the alienation of the specific land. And if no such license was obtained, the king or other lord might respectively enter on the land so aliened in mortmain as a forfeiture.

Yet such were the influence and ingenuity of the clergy that (notwithstanding this fundamental principle) we find that the largest and most considerable dotations of religious houses happened within less than two centuries after the Conquest. And (when a license could not be obtained) their contrivance seems to have been this: that, as the forfeiture for such alienations accrued in the first place to the immediate lord of the fee, the tenant who meant to alienate first conveyed his lands to the religious house, and instantly took them back again to hold as tenant to the monastery—which kind of instantaneous seisin was probably held not to occasion any forfeiture,—and then by pretext of some other for-

2. Not adopted in the United States except in Pennsylvania as to dedications to superstitious uses and conveyances to corporations without license. See Hopkins, Real Prop., 389.

feiture, surrender, or escheat, the society entered into those lands in right of such their newly acquired signiory, as immediate lords of the fee. Bnt when these dotations began to grow numerous, it was observed that the feodal services ordained for the defence of the kingdom were every day visibly withdrawn; that the circulation of landed property from man to man began to stagnate; and that the lords were curtailed of the fruits of their signiories, their escheats, wardships, reliefs, and the like; and therefore, in order to prevent this, it was ordered by the **second of King Henry III.'s Great Charter,** and afterwards by that printed in our common statute book, that all such attempts should be void, and the land forfeited to the lord of the fee. [270]

But, as this prohibition extended only to religious *houses*, bishops and other sole corporations were not included therein; and the aggregate ecclesiastical bodies,—who, Sir Edward Coke observes, in this were to be commended, that they ever had of their counsel the best learned men that they could get,—found many means to creep out of this statute, by buying in lands that were *bona fide* holden of themselves as lords of the fee, and thereby evading the forfeiture; or by taking long leases for years, which first introduced those extensive terms: for a thousand or more years, which are now so frequent in conveyances. This produced the **statute de religiosis,** 7 Edw. I., which provided that *no person*, religious or other whatsoever, should buy, or sell, or receive under pretence of a gift, or term of years, or any other title whatsoever, nor should by any art or ingenuity appropriate to himself any lands or tenements in mortmain, upon pain that the immediate lord of the fee, or, on his default for one year, the lords paramount, and, in default of all of them, the king, might enter thereon as forfeiture.

This seemed to be a sufficient security against all alienations in mortmain; but as these statutes extended only to gifts and conveyances between the parties, the religious houses now began to set up a fictitious title to the land, which it was intended they should have, and to bring an action to recover it against the tenant; who, by fraud and collusion, made no defence, and thereby judgment was given for the religious house, which then *recovered* the land by sentence of law upon a supposed prior title. [271] And thus they had the honor of inventing those fictitious adjudications of right, which are since become the great assurance of the kingdom, under the name of **common recoveries.** But upon this the **statute of Westminster the second,** 13 Edw. I. c. 32, enacted, that in such cases a jury shall try the true right of the demandants or plaintiffs to the land, and if the religious house or corporation be found to have it, they shall still recover seisin; otherwise it shall be forfeited to the immediate lord of the fee, or else to the next lord, and finally to the king, upon the immediate or other lord's default. So careful, indeed, was this provident prince to prevent any future evasions, that when the **statute of quia emptores,**[3] 18 Edw. I., abolished all subinfeudations, and gave

3. Because purchasers.

liberty for all men to alienate their lands to be holden of their next immediate lord, a proviso was inserted that this should not extend to authorize any kind of alienation in mortmain. And when afterwards the method of obtaining the king's license by writ of *ad quod damnum*[4] was marked out by the **statute 27 Edw. I. st. 2,** it was further provided by **statute 43 Edw. I. st. 3,** that no such license should be effectual without the consent of the mesne or intermediate lords.

Yet still it was found difficult to set bounds to ecclesiastical ingenuity; for when they were driven out of all their former holds, they devised a new method of conveyance, by which the lands were granted, not to themselves directly, but to nominal feoffees **to the use of the religious houses; thus distinguishing between the possession and the use,** and receiving the actual profits, while the seisin of the land remained in the nominal feoffee, who was held by the courts of equity,—then under the direction of the clergy,— to be bound in conscience to account to his *cestuy que use* for the rents and emoluments of the estate. [272] [See *post,* p. *328.] And it is to these inventions that our practisers are indebted for the introduction of uses and trusts, the foundation of modern conveyancing. But, unfortunately for the inventors themselves, they did not long enjoy the advantage of their new device; for **the statute 15 Ric. II. c. 5,** enacts that the lands which had been so purchased to uses should be amortized by license from the crown, or else be sold to private persons; and that, for the future, uses shall be subject to the statutes of mortmain, and forfeitable like the lands themselves. And whereas the statutes had been eluded by purchasing large tracts of land, adjoining to churches, and consecrating them by the name of churchyards,—such subtile imagination is also declared to be within the compass of the statutes of mortmain. And civil or lay corporations, as well as ecclesiastical, are also declared to be within the mischief, and of course within the remedy, provided by those salutary laws. And, lastly, as during the times of popery lands were frequently given to superstitious uses, though not to any corporate bodies, or were made liable in the hands of heirs and devisees to the charge of obits, chaunteries, and the like, which were equally pernicious in a well-governed state as actual alienations in mortmain; therefore, at the dawn of the Reformation, **the statute 23 Hen. VIII, c. 10,** declares that all future grants of lands for any of the purposes aforesaid, if granted for any longer term than twenty years, shall be void.

But during all this time it was in the power of the crown, by granting a license of mortmain, to remit the forfeiture, so far as related to its own rights, and to enable any spiritual or other corporation to purchase and hold any lands or tenements in perpetuity; which prerogative is declared and confirmed by the statute **18 Edw. III. st. 3, c. 3.** But as doubts were conceived, at the time of the Revolution, how far such license was valid, since the kings had no power to dispense with the

4. To what damage.

statutes of mortmain by a clause of *non obstante*, which was the usual course, though it seems to have been unnecessary; and as, by the gradual declension of mesne signiories through the long operation of the statute of *quia emptores*, the rights of intermediate lords were reduced to a very small compass; it was therefore provided by **the statute 7 & 8 W. III. c. 37,** that the crown for the future, at its own discretion, may grant licenses to aliene or take in mortmain, of whomsoever the tenements may be holden. After the dissolution of monasteries under Henry VIII., the statutes of mortmain were suspended for twenty years by the **statute 1 & 2 P. & M. c. 8,** and during that time any lands or tenements were allowed to be granted to any spiritual corporation without any license whatsoever. And long afterwards, for a much better purpose, the augmentation of poor living, it was enacted by the **statute 17 Car. II. c. 3,** that appropriators may annex the great tithes to the vicarages, and that all benefices under 100*l. per annum* may be augmented by the purchase of lands, without license of mortmain in either case; and the like provision hath been since made in favor of the governors of Queen Anne's bounty. It hath also been held that the statute 23 Hen. VIII., before mentioned, did not extend to anything but **superstitious uses;** and that therefore a man may give lands for the maintenance of a school, an hospital, or any other *charitable* uses. But as it was apprehended from recent experience that persons on their death-beds might make large and improvident dispositions even for these good purposes, and defeat the political ends of the statutes of mortmain, it is therefore enacted by the statute **9 Geo. II. c. 36,** that no lands or tenements, or money to be laid out thereon, shall be given for, or charged with, any *charitable* uses whatsoever, unless by deed indented, executed in the presence of two witnesses twelve calendar months before the death of the donor, and enrolled in the Court of Chancery within six months after its execution,—except stocks in the public funds, which may be transferred within six months previous to the donor's death,—and unless such gift be made to take effect immediately, and be without power of revocation; and that all other gifts shall be void. [274] The two universities [of Oxford and Cambridge], their colleges, and the scholars upon the foundation of the colleges of Eton, Winchester, and Westminster, are excepted out of this act.

2. Secondly, **alienation to an alien is also a cause of forfeiture** to the crown of the land so alienated; not only on account of his incapacity to hold them, which occasions him to be passed by in descents of land, but likewise on account of his presumption in attempting, by an act of his own, to acquire any real property, as was observed in the preceding book.[5]

5. "In many states the disabilities of alienage have been recovered, while in others they are removed only as to resident aliens." Hopkins, Real

3. Lastly, **alienations by particular tenants, when they are greater than the law entitles them to make,** and devest the remainder or reversion, are also forfeitures to him whose right is attacked thereby.[6]

As, if tenant for his own life alienes by feoffment or fine for the life of another, or in tail or in fee, these being estates which either must or may last longer than his own, the creating them is not only beyond his power and inconsistent with the nature of his interest, but is also a forfeiture of his own particular estate to him in remainder or reversion. For which there seem to be two reasons. First, because such alienation amounts to a renunciation of the feodal connection and dependence. The other reason is, because the particular tenant, by granting a larger estate than his own, has by his own act determined and put an entire end to his own original interest, and on such determination the next taker is entitled to enter regularly, as in his remainder or reversion. [275] The same law which is thus laid down with regard to tenants for life, holds also with respect to all tenants of the mere freehold or of chattel interests; but if tenant in tail alienes in fee, this is no immediate forftiture to the remainder-man, but a mere *discontinuance*, as it is called, of the estate-tail, which the issue may afterwards avoid by due course of law. But in case of such forfeitures by particular tenants, all legal estates by them before created, as if tenant for twenty years grants a lease for fifteen, and all charges by him lawfully made on the lands, shall be good and available in law. Equivalent, both in its nature and its consequences, to an illegal alienation by the particular tenant, is the civil crime of **disclaimer;** as where a tenant, who holds of any lord, neglects to render him the due services, and, upon an action brought to recover them, disclaims to hold of his lord,—which disclaimer of tenure in any court of record is a forfeiture of the lands to the lord, upon reasons most apparently feodal. And so likewise, if in any court of record the particular tenant does any act which amounts to a virtual disclamer: if he claims any greater estate than was granted him at the first infeodation, or takes upon himself those rights which belong only to tenant of a superior class; if he affirms the reversion to be in a stranger, by accepting his fine, attorning as his tenant, collusive pleading, and the like,—such behavior amounts to a forfeiture of his particular estate. [276]

Est., 388. Such being the case the doctrine of the text is not generally the law of this country. Any state laws are, of course, subject to modification or repeal by treaties made by the United States with foreign nations. Hopkins, Real Est., 388; 1 Stim. Am. St. Law, § 6013.

6. By statute in this country it is provided in many states that any conveyance by a tenant shall convey only such interest as he may lawfully convey and shall not work a forfeiture.

III. **Lapse is a species of forfeiture,** whereby the right of presentation to a church accrues to the ordinary by neglect of the patron to present, to the metropolitan by neglect of the ordinary, and to the king by neglect of the metropolitan.

IV. **By simony, the right of presentation to a living is forfeited,** and vested *pro hac vice* in the crown. [278] Simony is the corrupt presentation of any one to an ecclesiastical benefice for money, gift, or reward.

V. **The next kind of forfeitures are those by breach or non-performance of a condition annexed to the estate,** either expressly by deed at its original creation, or impliedly by law from a principle of natural reason. [284] Both which we considered at large in a former chapter.

VI. **Waste, vastum, is a spoil or destruction in houses, gardens, trees, or other corporeal hereditaments, to the disherison of him that hath the remainder or reversion in fee-simple or fee-tail.**[7]

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7. See *ante*, *122, note. See, also, Waste defined substantially as in the text in McCulloch v. Irvine, 13 Penn. St. 440; Ewell on Fixt. (2d Ed.), *81, note.

Cases respecting fixtures, which is relatively a modern word, are to be found in the old books, as a rule, under the head "Waste." The term "fixtures" has been used in many differing and often contradictory significations. See Ewell on Fixtures (2d Ed.), 1-7. We use the term "to designate things originally chattel in their nature, which are so fixed or annexed either actually or constructively to the realty, as to have lost either wholly or to some extent and for some purposes while so annexed, their character as movable chaatels." Id., 6.

The general rule of the common law was that whatever is fixed to the freehold becomes a part of the freehold and subject to the same rules of law as the soil itself; and it is to the relaxation of this rule to meet modern conditions that the law of fixtures owes its existence. It will be impracticable here to do more than show the most general modifications and limitations of this old common law rule:

(1) In the case of annexations to the soil made by strangers, i. e., persons holding no contractual relations with the owner of the soil, the old rule is still applied with considerable right. Ewell on Fixt., 54, 55 and notes, where the cases are exhaustively collected up to February, 1905.

(2) As between landlord and tenant, especially in the case of trade fixtures, the rule has been so relaxed as to enable the tenant to remove during the term almost any and every annexation not intended as a permanent improvement and that can be removed without permanent injury to the reversion. Id., ch. 4. The cases are very numerous on this proposition and will be found fully collected in the notes.

(3) As between tenants for life or in tail and their personal representatives and the remainderman or rever-

Waste is either **voluntary**, which is a crime of commission, as by pulling down a house, or it is **permissive**, which is a matter of omission only, as by suffering it to fall for want of necessary reparations. **Whatever does a lasting damage to the freehold or inheritance is waste.** Therefore, removing wainscot, floors, or other things once fixed to the freehold of a house is waste. If a house be destroyed by tempest, lightning, or the like, which is the act of Providence, it is no waste; but otherwise, if the house be burnt by the carelessness or negligence of the lessee, though now by the statute 6 Anne, c. 31, no action will lie against a tenant for an accident of this kind. Waste may also be committed in ponds, dove-houses, warrens, and the like, by so reducing the number of the creatures therein that there will not be sufficient for the reversioner when he comes to the inheritance. Timber also is part of the inheritance. Such are oak, ash, and elm in all places; and in some particular countries, by local custom, where other trees are generally used for building, they are for that reason considered as timber, and to cut down such trees, or top them, or do any other act whereby the timber may decay, is waste. But underwood the tenant may cut down at any seasonable time that he pleases, and may take sufficient estovers of common right for house-bote and cart-bote, unless restrained (which is usual) by particular covenants or exceptions. [282] The conversion of land from one species to another is waste. To convert wood, meadow, or pasture into arable, to turn arable, meadow, or pasture into woodland, or to turn arable or woodland into meadow or pasture, are all of them waste. For, as Sir

sioners, the cases are relatively few in number and the right of removal is not so liberally extended as in the case of landlord and tenant; still it is more liberal here than in the relation of executor and heir and vendor or mortgagor and vendee or mortgagee, where it is (in the absence of any reservation in the conveyance) applied with rigor. Id., chs. 7, 9.

(4) As already stated the rule is applied with rigor as between executor and heir and uncomplicated cases of vendor and vendee, etc. Id., chs. 7, 9. The cases of emblement on growing crops, game, fish, etc., etc., are elsewhere considered in this volume. To the best of our ability every decided case upon the general subject Fixtures, up to the year 1905, has been cited in our work on the subject, to which we must refer for details.

Edward Coke observes, it not only changes the course of husbandry, but the evidence of the estate, when such a close, which is conveyed and described as pasture, is found to be arable, and *e converso*. And the same rule is observed, for the same reason, with regard to converting one species of edifice into another, even though it is improved in its value. To open the land to search for mines of metal, coal, &c., is waste, for that is a detriment to the inheritance; but if the pits or mines were open before, it is no waste for the tenant to continue digging them for his own use; for it is now become the mere annual profit of the land. These three are the general heads of waste, viz. in houses, in timber, and in land. Though, as was before said, whatever else tends to the destruction, or depreciating the value of the inheritance, is considered by the law as waste.

Next, **who are liable to be punshed for committing waste.** And by the feodal law, feuds being originally granted for life only, we find that the rule was general for all vassals or feudatories: "*si vasallus feudum dissiparerit, aut insigni detrimente deterius fecerit, privabitur.*"[8] But in our ancient common law the rule was by no means so large, for not only he that was seized of an estate of inheritance might do as he pleased with it, but also waste was not punishable in any tenant save only in three persons,— **guardian in chivalry, tenant in dower, and tenant by the curtesy,** and not in tenant for life or years. [283] And the reason of the diversity was, that the estate of the three former was created by the act of the law itself, which therefore gave a remedy against them; but tenant for life, or for years, came in by the demise and lease of the owner of the fee, and therefore he might have provided against the committing of waste by his lessee, and if he did not it was his own default. But, in favor of the owners of the inheritance, **the statutes of Marlbridge, 52 Hen. III. c. 23, and of Gloucester, 6 Edw. I. c. 5,** provided that the writ of waste shall not only lie against tenants by the law of England (or curtesy), and those in dower, but against any farmer or other

8. If a vassal shall have wasted the fee, or diminished its value by any marked damage, he shall be deprived of it.

that holds in any manner for life or years. So that, for above five hundred years past, **all tenants merely for life or for any less estate,** have been **punishable or liable to be impeached for waste, both voluntary and permissive, unless their leases be made, as sometimes they are, without impeachment of waste,** *absque impetitione vasti;* that is, with a provision or protection that no man shall *impetere*, or sue him for waste committed. But **tenant in tail after possibility of issue extinct is not impeachable for waste,** because his estate was at its creation an estate of inheritance, and so not within the statutes. Neither does an action of waste lie *for the debtor* against tenant by statute, recognizance, or *elegit*, because against them the debtor may set off the damages in account; but it seems reasonable that it should lie *for the reversioner,* expectant on the determination of the debtor's own estate, or of these estates derived from the debtor.

The punishment for waste committed was, by common law and the statute of Marlbridge, only single damages, except in the case of a guardian, who also forfeited his wardship by the provisions of the Great Charter; but the statute of Gloucester directs that the other four species of tenants shall lose and forfeit the place wherein the waste is committed, and also treble damages to him that hath the inheritance. The expression of the statute is, "he shall forfeit the *thing* which he hath wasted," and it hath been determined that under these words the *place* is also included. And if waste be done *sparsim,* or here and there, all over a wood, the whole wood shall be recovered, or if in several rooms of a house, the whole house shall be forfeited; because it is impracticable for the reversioner to enjoy only the identical places wasted when lying interspersed with the other. [284] But if waste be done only in one end of a wood (or perhaps in one room of a house, if that can be conveniently separated from the rest), that part only is the *locus vastatus,* or thing wasted, and that only shall be forfeited to the reversioner.

VII. **A seventh species of forfeiture is that of copyhold estates, by breach of the customs of the manor.** Copyhold estates are not only liable to the same forfeitures as those which are held in socage, for treason, felony, alienation, and waste,—whereupon the lord may seize them without any presentment by the homage,—but also to peculiar forfeitures annexed to this species of tenure, which are incurred by the breach of either the general customs of all copyholds, or the peculiar local customs of certain particular manors.

VIII. **The eighth and last method whereby lands and tenements may become forfeited is that of bankruptcy,**[9] or the act of becoming a bankrupt; which unfortunate person may, from the several descriptions given of him in our statute law, be thus defined: a trader who secretes himself, or does certain other acts, tending to defraud his creditors. [285]

9. See *post*, chapter 31.

CHAPTER XIX.

V. OF TITLE BY ALIENATION.

The most usual and universal method of acquiring a title to real estates is that of alienation, conveyance, or purchase in its limited sense; under which may be comprised any method wherein estates are voluntarily resigned by one man and accepted by another, whether that be effected by sale, gift, marriage, settlement, devise, or other transmission of property by the mutual consent of the parties. [287]

This means of taking estates by alienation is not of equal antiquity in the law of England with that of taking them by descent. For by the feodal law, a pure and genuine feud could not be transferred from one feudatory to another without the consent of the lord. Neither could the feudatory then subject the land to his debts, for if he might, the feodal restraint of alienation would have been easily frustrated and evaded. And as he could not aliene it in his lifetime, so neither could he by will defeat the succession by devising his feud to another family, nor even alter the course of it by imposing particular limitations, or prescribing an unusual path of descent. Nor, in short, could he aliene the estate, even with the consent of the lord, unless he had also obtained the consent of his own next apparent or presumptive heir. And, on the other hand, as the feodal obligation was looked upon to be reciprocal, the lord could not aliene or transfer his signiory without the consent of his vassal. [288] This consent of the vassal was expressed by what was called *attorning*, or professing to become the tenant of the new lord, which doctrine of attornment was afterwards extended to all lessees for life or years. For if one bought an estate with any lease for life or years standing out thereon, and the lessee or tenant refused to attorn to the purchaser and to become his tenant, the grant or contract was in most cases void, or at least incomplete, which was also an additional clog upon alienations.

But by degrees this feodal severity is worn off, and experience hath shown that property best answers the purposes of civil life, especially in commercial countries, when its transfer and circulation are totally free and unrestrained. The road was cleared in the first place by a law of King Henry I., which allowed a man to sell and dispose of lands which he himself had purchased; but he was not allowed to sell the whole of his own acquirements so as totally to disinherit his children, any more than he was at liberty to aliene his paternal estate. [289] Afterwards a man seems to have been at liberty to part with all his own acquisitions, if he had previously purchased to him and his *assigns* by

name; but if his *assigns* were not specified in the purchase deed, he was not empowered to aliene, and also he might part with one-fourth of the inheritance of his ancestors without the consent of his heir. By the Great Charter of Henry III., no subinfeudation was permitted of part of the land unless sufficient was left to answer the services due to the superior lord,—which sufficiency was probably interpreted to be one-half or moiety of the land.

But these restrictions were in general removed by the statute of quia emptores,[1] **whereby all persons, except the king's tenants in capite,**[2] **were left at liberty to aliene all or any part of their lands at their own discretion.** And even these tenants *in capite* were by the statute 1 Edw. III. c. 12, permitted to aliene on paying a fine to the king. By the temporary statutes 7 Hen. VII, c. 3, and 3 Hen. VIII. c. 4, all persons attending the king in his wars were allowed to aliene their lands without license, and were relieved from other feodal burdens. And lastly, these very fines for alienations were, in all cases of freehold tenure, entirely abolished by the statute 12 Car. II. c. 24. **As to the power of charging lands with the debts of the owner,** this was introduced so early as stat. Westm. 2, which subjected a *moiety* of the tenant's lands to executions for debts recovered by law,[3] as the *whole* of them was likewise subjected to be pawned in a statute merchant by the statute *de mercatoribus*,[4] made the same year, and in a statute staple by statute 27 Edw. III. c. 9, and in other similar recognizances by statute 23 Hen. VIII. c. 6. And now the whole of them is not only subject to be *pawned* for the debts of the owner, but likewise to be absolutely *sold* for the benefit of trade and commerce by the several statutes of bankruptcy. [290] **The restraint of devising lands by will,** except in some places by particular custom, **lasted longer,** that not being totally removed till the abolition of the military tenure. **The doctrine of attornments,**[5] **continued still later** than any of the rest, and became extremely troublesome, though many methods were invented to evade them, till at last they were made no

1. Because purchasers.
2. In chief.
3. Considered later on.
4. Concerning merchants.
5. This was the agreement of the tenant to the grant of the seignory or of a rent, or the agreement of the donee in tail or tenant for life or

longer necessary to complete the grant or conveyance, by statute 4 & 5 Anne, c. 16, nor shall, by statute 11 Geo. II. c. 19, the attornment of any tenant affect the possession of any lands unless made with consent of the landlord, or to a mortgagee after the mortgage is forfeited, or by direction of a court of justice.

I. **Who may aliene, and to whom,** or, in other words, who is capable of conveying, and who of purchasing. **All persons in possession** are *prima facie* capable both of conveying and purchasing, unless the law has laid them under any particular disabilities. But if a man has only in him the *right* of either possession or property, he cannot convey it to any other, lest pretended titles might be granted to great men,[6] whereby justice might be trodden down and the weak oppressed. Yet reversions and vested remainders may be granted, because the possession of the particular tenant is the possession of him in reversion or remainder; but *contingencies* and mere *possibilities,* though they may be released or devised by will, or may pass to the heir or executor, yet cannot (it hath been said) be assigned to a stranger unless coupled with some present interest.[7]

Persons attainted of treason, felony, and praemunire are incapable of conveying, from the time of the offence committed, provided attainder follows, for such conveyance by them may tend to defeat the king of his forfeiture, or the lord of his escheat. [291] But they may *purchase* for the benefit of the crown or the lord of the fee, though they are disabled to *hold:* the lands so purchased, if after attainder, being subject to immediate forfeiture; if before, to escheat as well as forfeiture, according to the nature of the crime. So also corporations, religious or others, may purchase lands; yet, unless they have a license to hold in mortmain, they cannot retain such purchase, but it shall be forfeited to the lord of the fee.

Idiots and persons of nonsane memory, infants and persons under duress, are not totally disabled either to convey or purchase, but *sub modo* only. For their conveyances

years to a grant of a reversion or a remainder made to another. Co. Litt., 309; Bouvier Law Dict. Attornment. They are abolished in the United States. 4 Kent Com. 479.

6. Abolished in some states by statute and retained in others. Consult the local statutes.

7. See local statutes.

and purchases are **voidable**, but not actually void.[8] The king, indeed, on behalf of an idiot may avoid his grants or other acts. But it hath been said that a *non compos* himself, though he be afterwards brought to a right mind, shall not be permitted to allege his own insanity in order to avoid such grant; for that no man shall be allowed to stultify himself or plead his own disability.[9] **Clearly the next heir, or other person interested, may, after the death of the idiot or non compos, take advantage of his incapacity** and avoid the grant. And so, too, if he purchases under this disability, and does not afterwards upon recovering his senses agree to the purchase, his heir may either waive or accept the estate at his option. In like manner an infant may waive such purchase or conveyance when he comes to full age; or if he does not actually agree to it, his heirs may waive it after him. Persons also who purchase or convey under duress, may affirm or avoid such transaction whenever the duress is ceased.

The case of a feme-covert is somewhat different. She may purchase an estate without the consent of her husband, and the conveyance is good during the coverture, till he avoids it by some act declaring his dissent. [293] And though he does nothing to avoid it, or even if he actually consents, the fame-covert herself may, after the death of her husband, waive or disagree to the same; nay, even her heirs may waive it after her if she dies before her husband, or if in her widowhood she does nothing to express her consent or agreement. **But the conveyance or other con-**

8. See the leading case of Zouch v. Parsons, 3 Burr, 1794; s. c., 1 W. Black, 575; Ewell's Lead. Cases, 3 *et seq.* and notes. See *ante*, notes.

As to duress, see Stepney v. Lloyd, Cro. Eliz., 647, and Watkins v. Baird, 6 Mass. 506 (duress of imprisonment); Whitefield v. Longfellow, 13 Me. 146 (duress *per minas*, i. e., by threats); Astley v. Reynolds, 2 Strange, 915; Skeete v. Beale, 11 Ad. & Ell. 983, and Sasportas v. Jennings, 1 Bay. 470 (duress of goods); all reported in Ewell's Lead. Cases (1st Ed.), 760-794. (Cases collected in the notes.)

As to the effect of drunkenness, see Ewell's Lead. Cases (1st Ed.), 728-759 and notes.

Deaf and dumb persons are not deemed idiots. Brower v. Fisher, 4 John. Ch. 721; Ewell's Lead. Cases (1st Ed.), 721-727 and notes.

9. No longer the law. See preceding note.

tract of a feme-covert (except by some matter of record) is absolutely void and not merely voidable, and therefore cannot be affirmed or made good by any subsequent agreement.[1]

The case of an alien born is also peculiar. For he may purchase anything, but after purchase he can hold nothing except a lease for years of a house for convenience of merchandise, in case he be an alien friend; all other purchases (when found by an inquest of office) being immediately forfeited to the crown.[2]

Papists, lastly, and persons professing the popish religion, and neglecting to take the oath prescribed by statute 18 Geo. III. c. 60, within the time limited for that purpose, are by statute 11 & 12 W. III, c. 4, disabled to purchase any lands, rents, or hereditaments, and all estates made to their use or in trust for them are void. [This disability is now abolished by statute.]

II. Next, **how may a man aliene or convey**; which will lead us to consider the several modes of conveyance.

The common assurances of the kingdom are of four kinds: 1. **By matter in pais,** or deed, which is an assurance transacted between two or more private persons *in pais* in the country, that is (according to the old common law) upon the very spot to be transferred [294]; 2. **By matter of record;** or an assurance transacted only in the king's public courts of record; 3. **By special custom** obtaining in some particular places, and relating only to some particular species of property, — which three are such as take effect during the life of the party conveying or assuring. 4. The fourth takes no effect till after his death, and that is **by devise** contained in his last will and testament. We shall treat of each in its order.

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1. This was the well settled rule of the common law and is still the rule where the law has not been changed by statute. Martin v. Dwelly, 6 Wend. 9; Jackson v. Vanderheyden, 17 John 167; Ewell's Lead. Cases (1st Ed.), 298, 310 and notes.

In some states, however, as in Illinois, the common law disabilities of married women have been entirely removed by statutes, and in others they have been partially removed or greatly modified. See the local statutes.

2. This disability is quite generally abolished in the United States. See *ante*, notes.

CHAPTER XX.

OF ALIENATION BY DEED.

I. A deed is a writing sealed and delivered by the parties.[1] [295] It is sometimes called a charter, *carta,* from its materials; but most usually when applied to the transactions of private subjects, it is called a deed, because it is the most solemn and authentic act that a man can possibly perform with relation to the disposal of his property, and therefore **a man shall always be esopped by his own deed,** or not permitted to aver or prove anything in contradiction to what he has once so solemnly and deliberately avowed.[2] If a deed be made by more parties than one, there ought to be regularly as many copies of it as there are parties, and each should be **cut or indented** (formerly in acute angles *instar dentium,* like the teeth of a saw, but at present in a waving line) on the top or side, to tally or correspond with the other, which deed, so made, is called an **indenture.**[3] Formerly, when deeds were more concise than at present, it was usual to write both parts on the same piece of parchment, with some word or letters of the alphabet written between them, through which the parchment was cut, either in a straight or indented line, in such a manner as to leave half the word on one part and half on the other. Deeds thus made were denominated *syngrapha* by the canonists, and with us *chirographa* or handwritings, the word *cirographum*

1. Signing was formerly, before the Statute of Frauds, unnecessary to the validity of a deed; but is now necessary.

2. Hopkins, Real Prop., 453.

Deeds of release and quit-claim work no estoppel on the grantor as to subsequently acquired interests, though they do as to rights existing at the time of making the conveyance. Hopkins Real Prop., 454. See, generally, Bigelow on Estoppel, 6th Ed. (1913).

3. An indenture now differs from a deed-poll in that it purports to be executed between two or more parties, and contains the word "indenture" at its beginning, whereas a deed-poll purports to be executed by one party only, the grantor. The cutting or indenting described by the author is no longer in use. Conveyances of real estate have been variously regulated by statutes in the several states, which consult.

or *cyrographum* being usually that which is divided in making the indenture; and this custom is still preserved in making out the indentures of a fine, whereof hereafter. [296] But at length indenting only has come into use, without cutting through any letters at all, and it seems at present to serve for little other purpose than to give name to the species of the deed. When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the **original**, and the rest are **counterparts**; though of late it is most frequent for all the parties to execute every part, which renders them all originals. A deed made by one party only is not indented, but *polled*, or shaved quite even, and therefore called a **deed-poll**, or a single deed.[4]

II. Next, **the requisites of a deed.** The *first* of which is that there be **persons able to contract and be contracted with** for the purposes intended by the deed, and also a thing, or **subject-matter**, to be contracted for, — all which must be expressed by sufficient names. So as in every grant there must be a grantor, a grantee, and a thing granted, in every lease a lessor, a lessee, and a thing demised.

Secondly, **the deed must be founded upon good and sufficient consideration.** Not upon an usurious contract, nor upon fraud or collusion either to deceive purchasers *bona fide*, or just and lawful creditors, — any of which bad considerations will vacate the deed and subject such persons as put the same in ure, to forfeitures, and often to imprisonment. A deed, also, or other grant made without any consideration is, as it were, of no effect, for it is construed to inure or to be effectual only to the use of the grantor himself.[5] **The consideration** may be either a *good* or a *valuable* one. **A good consideration** is such as that of blood or of natural love and affection, when a man grants an estate to a near relation, being founded on motives of generosity, prudence, and natural duty. **A valuable consideration** is such as money, marriage, or the like, which the law esteems an

4. See note, *supra*.

5. A voluntary deed is good as between the parties to it. It may be void or voidable as to the grantor's creditors.

equivalent given for the grant, and is therefore founded in motives of justice. [297] Deeds made upon good consideration only are considered as merely voluntary, and are frequently set aside in favor of creditors and *bona-fide* purchasers.[6]

Thirdly, **the deed must be written, or, I presume, printed,** for it may be in any character or any language, but it must be upon paper or parchment. For if it be written on stone, board, linen, leather, or the like, it is no deed. Wood or stone may be more durable, and linen less liable to rasures, but writing on paper or parchment unites in itself, more perfectly than any other way, both those desirable qualities; for there is nothing else so durable, and at the same time so little liable to alteration, nothing so secure from alteration that is at the same time so durable. It must also have the regular **stamps** imposed on it by the several statutes for the increase of the public revenue, else it cannot be given in evidence.[7] Formerly many conveyances were made by parol, or word of mouth only, without writing; but this giving a handle to a variety of frauds, **the statute 29 Car. II. c. 3,** enacts that no lease-estate or interest in lands, tenements, or hereditaments, made by livery of seisin or by parol only (except leases not exceeding three years from the making, and whereon the reserved rent is at least two-thirds of the real value), shall be looked upon as of greater force than a lease or estate at will, nor shall any assignment, grant, or surrender of any interest in any freehold hereditaments be valid, unless in both cases the same

6. The acknowledgment of a consideration in the deed while it estops the grantor from denying a consideration for the purpose of avoiding the deed, does not conclude him as to the *quantum* or amount thereof, which may, when relevant, be proved by any competent evidence. Hopkins, Real Prop., 410, 427.

As to the effect of conveyances in fraud of creditors and *bona fide* purchasers, see Twyne's Case, 3 Coke, 80; 1 Smith's Lead. Cases (6th Am. Ed.), 1-88 and notes. The statutes of 13 Eliz., c. 5, designed to protect creditors, and 27 Eliz., c. 4, to protect *bona fide* purchasers, are construed in Twyne's Case, and the American authorities are collected in the notes. Similar statutes have been enacted in most, if not all, of the states. See the local statutes and generally Bigelow on Fraud (1890), 2 vols.

7. There is at present no stamp law in the United States, though one is under consideration.

be put in writing and signed by the party granting, or his agent lawfully authorized in writing.[8]

Fourthly, **the matter written must be legally or orderly set forth**, that is, there must be words sufficient to specify the agreement and bind the parties, — which sufficiency must be left to the courts of law to determine. [298]

I. **The premises** may be used to set forth the number and names of the parties, with their additions or titles. They also contain the recital, if any, of such deeds, agreements, or matters of fact as are necessary to explain the reasons upon which the present transaction is founded; and herein also is set down the consideration upon which the deed is made. And then follows the certainty of the grantor, grantee, and thing granted.

2, 3. Next come **the habendum and tenendum.** The office of **the habendum** is properly to determine what estate or interest is granted by the deed, though this may be performed, and sometimes is performed, in the premises, in which case the *habendum* may lessen, enlarge, explain, or qualify, but not totally contradict or be repugnant to the estate granted in the premises. As if a grant be "to A and the heirs of his body" in the premises, *habendum* "to him and his heirs forever," or *vice versa*. Here A has an estate-tail, and a fee-simple expectant thereon. But had it been in the premises "to him and his heirs," *habendum* "to him for life," the *habendum* would be utterly void; for an estate of inheritance is vested in him before the *habendum* comes, and shall not afterwards be taken away or devested by it. **The tenendum,** "and to hold," is now of very little use, and is only kept in by custom. It was sometimes formerly used to signify the tenure by which the estate granted was to be holden, viz., "*tenendum per servitium militare, in burgagio, in libero socagio,*[9] etc." [299] But all these being now re-

8. This statute has in whole or in part been re-enacted in most of the states; and in all, so far as we know, conveyances of land are by deed, though the forms thereof have been greatly simplified. The student is advised to purchase a set of printed conveyance blanks in the state where he resides and study them and compare them with the requirements of the text and the local statutes and decisions.

9. To hold by military service, in burgage, in free socage, etc.

duced to free and common socage, the tenure is never specified.

4. Next follow **the terms of stipulation**, if any, upon which the grant is made, the first of which is **the reddendum**, or reservation, whereby the grantor doth create or reserve some new thing to himself out of what he had before granted, as "rendering therefor yearly the sum of ten shillings, or a pepper-corn, or two days' ploughing, or the like." To make a *reddendum* good, if it be of anything newly created by the deed, the reservation must be to the grantors, or some, or one of them, and not to any stranger to the deed. But if it be of ancient services or the like annexed to the land, then the reservation may be to the lord of the fee.

5. Another of the terms upon which a grant may be made is a **condition**, which is a clause of contingency, on the happening of which the estate granted may be defeated: as "provided always, that if the mortgagor shall pay the mortgagee £500 upon such a day, the whole estate granted shall determine;" and the like. [300]

6. Next may follow **the clause of warranty**, whereby the grantor doth, for himself and his heirs, warrant and secure to the grantee the estate so granted.

7. After warranty usually follow **covenants** or conventions, which are clauses of agreement contained in a deed, whereby either party may stipulate for the truth of certain facts, or may bind himself to perform or give something to the other. [304] Thus the grantor may covenant that he hath a right to convey, or for the grantee's quiet enjoyment, or the like; the grantee may covenant to pay his rent or keep the premises in repair, &c. If the covenantor covenants for himself and his *heirs*, it is then a covenant real, and descends upon the heirs, who are bound to perform it, provided they have assets by descent, but not otherwise. If he covenants also for his *executors* and *administrators*, his personal assets, as well as his real, are likewise pledged for the performance of the covenant, which makes such covenant a better security than any warranty. It is also in some respects a less security, and therefore more beneficial to the grantor, who usually *covenants* only for the acts of himself

and his ancestors, whereas a general *warranty* extends to all mankind,— for which reasons the covenant has in modern practice totally supersede the other.[1]

8. Lastly comes **the conclusion**, which mentions the execution and date of deed, or the time of its being given or executed, either expressly or by reference to some day and year before mentioned. Not but a deed is good although it mention no date, or hath a false date, or even if it hath an impossible date, as the thirtieth of February, provided the real day of its being dated or given, that is delivered, can be proved.

The fifth requisite for making a good deed is the reading of it. This is necessary wherever any of the parties desire it, and if it be not done on his request, the deed is void as to him. If he can, he should read it himself; if he be blind or illiterate, another must read it to him. If it be read falsely it will be void, at least for so much as is misrecited, unless it be agreed by collusion that the deed shall be read false on purpose to make it void, for in such case it shall bind the fraudulent party.[2]

Sixthly, **it is requisite that the party whose deed it is should seal, and now in most cases** [by virtue of the statute of frauds] **I apprehend should sign it also.**[3] [305]

A seventh requisite to a good deed is that it be delivered by the party himself or his certain attorney, which therefore is also expressed in the attestation, "sealed and *delivered.*" [307] **A deed takes effect only from this tradition or delivery**; for if the date be false or impossible, the

1. In this country the usual covenants are (1) the covenant of seisin; (2) of good right to sell and convey; (3) against incumbrances; (4) for quiet enjoyment; and (5) of general warranty.

2. Hopkins, Real Prop., 429.

If a party to the deed can read, he is conclusively presumed to know the contents of the instrument, though he did not actually read it before it was executed. Hopkins, Real Prop., 429. See, generally, as to the requisites of deeds, Hopkins, Real Prop., 414 *et seq.*

3. A common law seal is an impression upon wax, wafer or any other tenacious substance capable of receiving an impression. In many states a seal is no longer necessary; in others a scroll made by a pen or printed on the paper is sufficient. So in Michigan and Illinois. See, generally, Hopkins, Real Prop., 429, 430.

delivery ascertains the time of it. And if another person seals the deed, yet if the party delivers it himself, he thereby adopts the sealing, and by a parity of reason the signing also, and makes them both his own. A delivery may be either absolute, that is to the party or grantee himself, or to a third person, to hold till some conditions be performed on the part of the grantee, in which last case it is not delivered as a *deed* but as an **escrow**, that is, as a scrowl or writing which is not to take effect as a deed till the conditions be performed, and then it is a deed to all intents and purposes.[4]

The last requisite to the validity of a deed is the attestation, or execution of it *in the presence of witnesses,* though this is necessary rather for preserving the evidence than for constituting the essence of the deed.[5]

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4. When the condition has been performed the deed takes effect from the time of the first delivery, unless intervening rights have attached. Hopkins, Real Prop., 436, 437.

5. Attestation by witnesses and acknowledgment before an officer are usually also required in this country in order to entitle the deed to record; and in some states in order to render it valid. The local statutes should be carefully examined before using any printed blank.

Illinois has, by statute, provided an optional system of registration of title, the so-called Torren's system. See Ill. Land Titles Act, approved June 13, 1895; Rev. Stat. Ill., ch. 30, secs. 43 *et seq.;* Hopkins, Real Prop., 412, 413; The Torren's System, by M. M. Yeakle, 1894.

The following will serve as an example of a modern deed:

This Indenture, Made this 31st day of August, in the year of our Lord one thousand nine hundred and fourteen, between James Jackson and Mary Jackson, his wife, both of the City of Ludington, Mason County, Michigan, parties of the first part, and Henry James of the same place of the second part,

Witnesseth, That the said parties of the first part, for and in consideration of the sum of one dollar and other valuable considerations to them in hand paid by the said party of the second part, the receipt whereof is hereby confessed and acknowledged, do by these presents grant, bargain, sell, remise, release, alien and confirm unto the said party of the second part, and his heirs and assigns, forever, all that certain piece or parcel of land situate and being in the City of Ludington, County of Mason, and State of Michigan, and described as follows, to-wit:

[Here insert description of the premises conveyed.]

Together with all and singular the hereditaments and appurtenances thereunto belonging or in anywise appertaining: *To Have and to Hold* the said premises as above described,

III. Next, **how may a deed be avoided,** or rendered of no effect. [308] And from what has been before laid down, it will follow that **if a deed wants any of the essential re-**

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with the appurtenances, unto the said party of the second part, and to his heirs and assigns forever. And the said James Jackson, one of said parties of the first part, for himself, his heirs, executors and administrators, does covenant, grant, bargain and agree to and with the said party of the second part, his heirs and assigns, that at the time of the ensealing and delivery of these presents, he is well seized of the above granted premises in fee simple; that they are free from all incumbrances whatever and that he will, and his heirs, executors, and administrators shall *Warrant and Defend* the same against all lawful claims whatsoever.

[Any exceptions, reservations, conditions and special covenants, if any, may be inserted here. The order of sequence is not important.]

In Witness Whereof, the said parties of the first part have hereunto set their hands and seals the day and year first above written.

James Jackson. [Seal]
Mary Jackson. [Seal]

Sealed and delivered in presence of
John Doe.
Richard Roe.

State of Michigan,
County of Mason, ss.:

On this 31st day of August, in the year one thousand nine hundred and fourteen, before me a notary public in and for said county, personally appeared James Jackson and Mary Jackson, his wife, to me known to be the same persons described in and who executed the within instrument, who severally acknowledged the same to be their free act and deed.

Official Seal

[* * * * * * *]

Hugh A. Thompson,
Notary Public in and for said county.

My commission will expire on the 1st day of August, 1916.

Hugh A. Thompson.

Note.—The provision of the statute as to the acknowledgment must be followed. If, as is often the case, a separate examination of the wife, etc., is required, the following clause, or one conforming to the statute, should be inserted in the line of stars inclosed by brackets. "And the said Mary Jackson, wife of the said James Jackson, on a private examination by me separate and apart from her said husband, acknowledged that she executed the said deed freely and without fear or compulsion from her said husband or from any one."

(Indorsement):

WARRANTY DEED.
Short Form.

James Jackson and Mary Jackson, his wife,
to
Henry James.

Register's Office,
State of Michigan, } ss.:
Mason County, }

Received for record, the 31st day of August, A. D. 1914, at 2 o'clock, P. M., and recorded in Liber 100 of Deeds, on page 500.

Albert Jones,
Register.

quisites before mentioned, either,— 1. Proper parties and a proper subject-matter; 2. A good and sufficient consideration; 3. Writing on paper or parchment duly stamped; 4. Sufficient and legal words, properly disposed; 5. Reading, if desired, before the execution; 6. Sealing and, by the statute, in most cases signing also; or 7. Delivery,— it is a void deed *ab initio*.[6] It may also be avoided by matter ex post facto; as, 1. By rasure, interlining, or other alteration in any material part, unless a memorandum is made thereof at the time of the execution and attestation.[7] 2. By breaking off or defacing the seal. 3. By delivering it up to be cancelled, that is, to have lines drawn over it in the form of lattice-work or *cancelli*, though the phrase is now used figuratively for any manner of obliteration or defacing it.[8] [309] 4. By the disagreement of such whose concurrence is necessary in order for the deed to stand, as the husband, where a feme-covert is concerned, an infant, or person under duress, when those disabilities are removed, and the like. 5. By the judgment or decree of a court of judicature. This was anciently the province of the Court of Star-Chamber, and now of the Chancery, when it appears that the deed was obtained by fraud, force, or other foul practice, or is proved to be an absolute forgery. In any of these cases the deed may be voided, either in part or totally, according as the cause of avoidance is more or less extensive.[9]

6. See the preceding notes.

7. Happening afterwards. When there is nothing suspicious about the appearance of the interlineation or erasure, the better opinion is that it is *prima facie* presumed to have been made before the delivery; but where the appearance of the erasure, etc., is such as, unexplained, to create a suspicion, such suspicious appearance must be explained to the satisfaction of the judge before the document will be admitted in evidence. 4 Chamberlayne's Evidence, § 3103 and cases cited.

8. If the title has once passed by virtue of the deed, any subsequent defacing or destruction of the document though it may destroy the evidence of the passing of the title, will not revert the title in the grantor.

9. See vol. 2, Equity, for a consideration of this subject.

Deeds used in the conveyance of real estate are either conveyances at *common law*, or such as receive their force and efficacy by virtue of the *statute of uses*.

I. **Of conveyances by the common law,** some may be called *original* or *primary* conveyances, which are those by means whereof the benefit or estate is created or first arises; others are *derivative* or *secondary*, whereby the benefit or estate originally created is enlarged, restrained, transferred, or extinguished.

Original conveyances are the following: 1, Feoffment; 2, Gift; 3, Grant; 4, Lease; 5, Exchange; 6, Partition. *Derivative* are: 7, Release; 8, Confirmation: 9, Surrender; 10, Assignment; 11, Defeasance. [310]

1. **A feoffment** (*feoffamentum*) is a substantive derived from the verb to enfeoff (*feoffare* or *infeudare*), to give one a feud, and therefore feoffment is properly *donatio feudi*. It is the most ancient method of conveyance, the most solemn and public, and therefore the most easily remembered and proved. And it may properly be defined **the gift of any corporeal hereditament to another.** He that so gives or enfeoffs is called the *feoffor*, and the person enfeoffed is denominated the *feoffee*.

This is plainly derived from, or is indeed itself the very mode of, the ancient feodal donation; for though it may be performed by the word "*enfeoff*," or "grant," yet the aptest word of feoffment is "*do* or *dedi*." But by the mere words of the deed the feoffment is by no means perfected; there remains a very material ceremony to be performed, called *livery of seisin*, without which the feoffee has but a mere estate at will. [311] This livery of seisin is no other than the pure feodal investiture or delivery of corporeal possession of the land or tenement, which was held absolutely necessary to complete the donation.[1]

Livery of seisin, by the common law, is necessary to be made upon every grant of an estate of freehold in hereditaments corporeal, whether of inheritance or for life only.

1. Deeds of feoffment and livery of seisin are obsolete in this country. The most common form of conveyance is a deed of bargain and sale. See Hopkins, Real Prop., 405.

[314] In hereditaments incorporeal it is impossible to be made, for they are not the object of the senses, and in leases for years or other chattel interests it is not necessary. In leases for years indeed an actual *entry* is necessary to vest the estate in the lessee, for the bare lease gives him only a right to enter, which is called his interest in the term, or *interesse termini;* and when he enters in pursuance of that right, he is then, and not before, in possession of his term, and complete tenant for years.

On the creation of a freehold remainder at one and the same time with a particular estate for years at the common law livery must be made to the particular tenant. But if such a remainder be created afterwards, expectant on a lease for years now in being, the livery must not be made to the lessee for years, for then it operates nothing. But it must be made to the remainder-man himself, by consent of the lessee for years, for without his consent no livery of the possession can be given, — partly because such forcible livery would be an ejectment of the tenant from his term, and partly for the reasons before given for introducing the doctrine of attornments. [315]

Livery of seisin is either in *deed* or in *law*. **Livery in deed** is thus performed. The feoffor, lessor, or his attorney, together with the feoffee, lessee, or his attorney (for this may as effectually be done by deputy or attorney as by the principals themselves in person), come to the land or to the house, and there, in the presence of witnesses, declare the contents of the feoffment or lease on which livery is to be made. And then the feoffor, if it be of land, doth deliver to the feoffee, all other persons being out of the ground, a clod or turf, or a twig or bough, there growing, with words to this effect: "I deliever these to you in the name of seisin of all the lands and tenements contained in this deed." But if it be of a house, the feoffor must take the ring or latch of the door, the house being quite empty, and deliver it to the feoffee in the same form; and then the feoffee must enter alone and shut to the door, and then open it and let in the others. If the conveyance or feoffment be of divers lands lying scattered in one and the same county, then in

the feoffor's possession, livery of seisin of any parcel in the name of the rest sufficeth for all; but if they be in several counties there must be as many liveries as there are counties. For if the title to these lands comes to be disputed, there must be as many trials as there are counties, and the jury of one county are no judges of the notoriety of a fact in another. Besides, anciently this seisin was obliged to be delivered *coram paribus de vicineto,* before the peers or freeholders of the neighborhood, who attested such delivery in the body or on the back of the deed. Also, if the lands be out on lease, though all lie in the same county, there must be as many liveries as there are tenants, because no livery can be made in this case but by the consent of the particular tenant, and the consent of one will not bind the rest. [316] And in all these cases it is prudent and usual to endorse the livery of seisin on the back of the deed, specifying the manner, place, and time of making it, together with the names of the witnesses.

Livery in law is where the same is not made *on* the land, but *in sight of it only,* the feoffor saying to the feoffee, "I give you yonder land; enter and take possession." Here, if the feoffee enters during the life of the feoffor, it is a good livery, but not otherwise, unless he dares not enter, through fear of his life or bodily harm; and then his continual claim, made yearly in due form of law, as near as possible to the lands, will suffice without an entry. This livery in law cannot, however, be given or received by attorney, but only by the parties themselves.

2. **The conveyance by gift** (*donatio*) **is properly applied to the creation of an estate-tail,** as feoffment is to that of an estate in fee, and lease to that of an estate for life or years. It differs in nothing from a feoffment but in the nature of an estate passing by it, for the operative words of conveyance in this case are *do* or *dedi*, and gifts in tail are equally imperfect without livery or seisin, as feoffments in fee-simple.[2]

2. See preceding note. Estates-tail, where they exist, are limited by an ordinary deed of bargain and sale containing the proper words of limitation. See Hopkins, Real Prop., 406, 411.

3. **Grants, *concessiones*, constitute the regular method by the common law of transferring the property of incorporeal hereditaments**, or such things whereof no livery can be had. [317] For which reason all corporeal hereditaments, as lands and houses, are said to lie *in livery;* and the others, as advowsons, commons, rents, reversions, &c., to lie *in grant.* These, therefore, pass merely by the delivery of the deed. And in signiories, or reversions of lands, such grant, together with the attornment of the tenant (while attornments were requisite), were held to be of equal notoriety with, and therefore equivalent to, a feoffment and livery of lands in immediate possession. It therefore differs but little from a feoffment, except in its subject-matter, for the operative words therein commonly used are *dedi et concessi,* "have given and granted."[3]

4. **A lease is properly a conveyance of any lands or tenements** (usually in consideration of rent or other annual recompense) **made for life, for years, or at will, but always for a less time than the lessor hath in the premises**; for if it be for the *whole* interest, it is more properly an assignment than a lease. The usual words of operation in it are "demise, grant, and to farm let; *dimisi, concessi, et ad firmam tradidi.*" [318] By this conveyance an estate for life, for years, or at will, may be created, either in corporeal or incorporeal hereditaments, though livery of seisin is indeed incident and necessary to one species of leases, viz., leases for life of corporeal hereditaments, but to no other.[4]

By the common law, as it has stood for many centuries, all persons seised of any estate might let leases to endure so long as their own interest lasted, but no longer. Therefore tenant in fee-simple might let leases of any duration, for he hath the whole interest; but tenant in tail, or tenant for life, could make no leases which should bind the issue in tail or reversioner, nor could a husband, seised *jure*

3. See Hopkins, Real Prop., 407. The statutes in many of the states provide short form deeds either of warranty or quit-claim. The common law forms may, however, still be used, except that feoffment has been abolished by statute in some states. Hopkins, Real Prop., 411; 1 Stim. Am. Stat. Law, § 1470.

4. No longer necessary. As to leases, see Hopkins, Real Prop., 407.

uxoris,[5] make a firm or valid lease for any longer term than the joint lives of himself and his wife, for then his interest expired.

5. **An exchange is a mutual grant of equal interests, the one in consideration of the other.** [323] The word "exchange" is so individually requisite and appropriated by law to this case, that it cannot be supplied by any other word, or expressed by any circumlocution. The estates exchanged must be equal in quantity; not of *value*, for that is immaterial, but of *interest;* as fee-simple for fee-simple, a lease for twenty years for a lease for twenty years, and the like. And the exchange may be of things that lie either in grant or in livery. But no livery of seisin, even in exchanges of freehold, is necessary to perfect the conveyance; for each party stands in the place of the other and occupies his right, and each of them hath already had corporal possession of his own land. But entry must be made on both sides; for if either party die before entry, the exchange is void for want of sufficient notoriety.[6]

6. **A partition is when two or more joint-tenants, coparceners, or tenants in common agree to divide the lands so held among them in severalty,** each taking a distinct part.[7] [324] Here, as in some instances there is a unity of interest and in all a unity of possession, it is necessary that they all mutually convey and assure to each other the several estates which they are to take and enjoy separately. By the common law coparceners, being compellable to make partition, might have made it by parol only; but joint-tenants and tenants in common must have done it by deed: and in both cases the conveyance must have been perfected by livery of seisin. And the statutes of 31 Hen. VIII. c. 1 and 32 Hen. VIII. c. 32 made no alteration in this point. But the statute of frauds, 20 Car. II. c. 2, hath now abolished this distinction, and made a deed in all cases necessary.

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5. By right of his wife.

6. See Hopkins on Real Est., 407. An exchange may be effected by separate deeds executed by the respective parties to each other.

7. This may be effected by mutual deeds of quit-claim. See, generally, Hopkins on Real Estate, 344. See the local statutes.

These are the several species of *primary* or *original* conveyances. Those which remain are of **the secondary or derivative sort**, which presuppose some other conveyance precedent, and only serve to enlarge, confirm, alter, restrain, restore, or transfer the interest granted by such original conveyance. As,

7. **Releases; which are a discharge or a conveyance of a man's right in lands or tenements to another that hath some former estate in possession.** The words generally used therein are "remised, released, and for ever quit-claimed."[8] And these releases may inure either, 1. By way of *enlarging an estate* or *enlarger l'estate:* as if there be tenant for life or years, remainder to another in fee, and he in remainder releases all his right to the particular tenant and his heirs; this gives him the estate in fee. But in this case the relessee must be in *possession* of some estate for the release to work upon; for if there be lessee for years, and, before he enters and is in possession, the lessor releases to him all his right in the reversion, such release is void for want of possession in the relessee. 2. By way of *passing an estate,* or *mitter l'estate:* as when one of two coparceners releaseth all her right to the other, this passeth the fee-simple of the whole. [325] And in both these cases there must be a privity of estate between the relessor and relessee; that is, one of their estates must be so related to the other as to make but one and the same estate in law. 3. By way of *passing a right,* or *mitter le droit:* as if a man be disseised, and releaseth to his disseisor all his right, hereby the disseisor acquires a new right, which changes the quality of his estate, and renders that lawful which before was tortious or wrongful. 4. By way of *extinguishment:* as if my tenant for life makes a lease to A for life, remainder to B and his heirs, and I release to A; this extinguishes my right to the reversion, and shall inure to the advantage of B's remainder as well as of A's particular estate. 5. By way of *entry* and *feoff-*

8. In common use in the United States. "A release is like our modern quit-claim deed, except that in the quit-claim possession of the grantee is not necessary and further in the release privity of estate between the parties was required." Hopkins, Real Estate, 408.

ment: as if there be two joint disseisors, and the disseisee releases to one of them, he shall be sole seised, and shall keep out his former companion; which is the same in effect as if the disseisee had entered and thereby put an end to the disseisin, and afterwards had enfeoffed one of the disseisors in fee. And hereupon we may observe, that when a man has in himself the possession of lands, he must at the common law convey the freehold by feoffment and livery, which makes a notoriety in the country. But if a man has only a right or a future interest, he may convey that right or interest by a mere release to him that is in possession of the land, for the occupancy of the relessee is a matter of sufficient notoriety already.

8. **A confirmation is** of a nature nearly allied to a release. Sir Edward Coke defines it to be **a conveyance of an estate or right in esse, whereby a voidable estate is made sure and unavoidable,** or **whereby a particular estate is increased**; and the words of making it are these, "have given, granted, ratified, approved, and confirmed."[9] An instance of the first branch of the definition is, if tenant for life leaseth for forty years, and dieth during that term, here the lease for years is voidable by him in reversion; yet, if he hath confirmed the estate of the lessee for years, before the death of tenant for life, it is no longer voidable, but sure. [326] The latter branch, or that which tends to the increase of a particular estate, is the same in all respects with that species of release which operates by way of enlargement.

9. **A surrender,** *sursumredditio,* or rendering up, is of a nature directly opposite to a release; for as that operates by the greater estate's descending upon the less, a surrender is the falling of a less estate into a greater. **It is defined a yielding up of an estate for life or years to him that hath the immediate reversion or remainder,** wherein the particular estate may merge or drown by mutual agree-

9. It should not be used if the conveyance it is intended to validate was originally void, though it is said that such an instrument would now by many courts be made effective as some other form of conveyance. Hopkins, Real Prop., 408.

ment between them.[1] It is done by these words, "hath surrendered, granted, and yielded up." The surrenderor must be in possession, and the surrenderee must have a higher estate, in which the estate surrendered may merge; therefore tenant for life cannot surrender to him in remainder for years. In a surrender there is no occasion for livery of seisin, for there is a privity of estate between the surrenderor and the surrenderee: the one's particular estate and the other's remainder are one and the same estate, and livery having been once made at the creation of it, there is no necessity for having it afterwards. And, for the same reason, no livery is required on a release or confirmation in fee to tenant for years or at will, though a freehold thereby passes, since the reversion of the lessor or confirmor, and the particular estate of the relessee or confirmee, are one and the same estate; and where there is already a possession, derived from such a privity of estate, any further delivery of possession would be vain and nugatory.

10. **An assignment is properly a transfer, or making over to another, of the right one has in any estate**; but it is usually applied to an estate for life or years. And it differs from a lease only in this, that by a lease one grants an interest less than his own, reserving to himself a reversion; in assignments he parts with the whole property, and the assignee stands to all intents and purposes in the place of the assignor.[2] [327]

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1. Privity of estate is necessary, and the surrender can be made only to the holder of the next immediate esate. Hopkins, Real Prop., 408.

2. This is not universally true; for there is a variety of distinctions when the assignee is bound by the covenants of the assignor, and when he is not. *The general rule is, that he is bound by all covenants which run with the land; but not by collateral covenants which do not run with the land.* As if a lessee covenants for himself, executors and administrators, concerning a thing not in existence, as to build a wall upon the premises, the assignee will not be bound; but the assignee will be bound, if the lessee has covenanted for himself and *assigns*. Where the lessee covenants for himself, his executors and administrators, to reside upon the premises, this covenant binds his assignee, for it runs with, or is appurtenant to, the thing demised. 2 Hen. Bl. 133. The assignee in no case is bound by the covenant of the lessee, to build a house for the lessor any where *off*

11. **A defeasance is a collateral deed, made at the same time with a feoffment or other conveyance, containing certain conditions, upon the performance of which the estate then created may be defeated** or totally undone. And in this manner mortgages were in former times usually made; the mortgagor enfeoffing the mortgagee, and he at the same time executing a deed of defeasance, whereby the feoffment was rendered void on repayment of the money borrowed at a certain day.[3] And this, when executed at the same time with the original feoffment, was considered as part of it by the ancient law, and, therefore, only indulged, — no subsequent secret revocation of a solemn conveyance, executed by livery of seisin, being allowed in those days of simplicity and truth, though, when uses were afterwards introduced, a revocation of such uses was permitted by the courts of equity. But things that were merely executory, or to be completed by matter subsequent (as rents, of which no seisin could be had till the time of payment), and so also annuities, conditions, warranties, and the like, were always liable to be recalled by defeasances made subsequent to the time of their creation.

II. **Conveyances which have their force and operation by virtue of the statute of uses.**

Uses and trusts are in their original of a nature very similar, or rather exactly the same, answering more to the *fidei-commissum*[4] than the *usus fructus*[5] of the civil law,

the premises, or to pay money to a *stranger*. 5 Co. 16. The assignee is not bound by a covenant broken *before* assignment. 3 Burr. 1271. See Com. Dig. Covenant. But if an underlease is made even for a day less than the whole term, the underlessee is not liable for rent or covenants to the original lessee, like an assignee of the whole term. Dougl. 183, 56. An assignee is liable for rent only whilst he continues in possession under the assignment. And he is held not to be guilty of a fraud, if he assigns even to a beggar, or to a person leaving the kingdom, provided the assignment be executed before his departure. 1 B. & P. 21. The same principle prevails in equity. See 2 Bridg. Eq. Dig. 138, 1 Vern. 87, 2 Vern. 103, 8 Ves. 95, 1 Sch. & Lefroy, 310. But the assignee's liability commences upon acceptance of the lease, though he never enter. 1 B. & P. 238.

3. The conveyance and defeasance of a mortgage are now in practice combined (though not necessarily so) in one instrument.

4. A trust.

5. A usufruct.

which latter was the temporary right of using a thing without having the ultimate property or full dominion of the substance. But the *fidei-commissum,* which usually was created by will, was the disposal of an inheritance to one, in confidence that he should convey it or dispose of the profits at the will of another. [328] In our law, a use is a confidence reposed in another who was tenant of the land, or *terre-tenant,* that he should dispose of the land according to the intentions of *cestuy que use,* or him to whose use it was granted, and suffer him to take the profits. As, if a feoffment was made to A and his heirs, to the use of (or in trust for) B and his heirs, here at the common law A, the *terre-tenant,* had the legal property and possession of the land, but B, the *cestuy que use,* was in conscience and equity to have the profits and disposal of it.

This notion was transplanted into England from the civil law, about the close of the reign of Edward III., by means of the foreign ecclesiastics, who introduced it to evade the statutes of mortmain, by obtaining grants of lands, not to religious houses directly, but to *the use of* the religious houses, which the clerical chancellors of those times held to be *fidei-commissa* and binding in conscience, and therefore assumed the jurisdiction which Augustus had vested in his *praetor,* of compelling the execution of such trusts in the Court of Chancery.

Originally it was held that the chancery could give no relief but against the very person himself intrusted for *cestuy que use,* and not against his heir or alienee. [329] This was altered in the reign of Henry VI. with respect to the heir, and afterwards the same rule, by a parity of reason, was extended to such alienees as had purchased either without a valuable consideration, or with an express notice of the use. But **a purchaser for a valuable consideration, without notice** might hold the land discharged of any trust or confidence. And also it was held that neither the king nor queen on account of their dignity royal, nor any corporation aggregate on account of its limited capacity, could be seised to any use but their own; that is, they might hold the lands, but were not compellable to execute the trust.

[330] And if the feoffee to uses died without heir, or committed a forfeiture or married, neither the lord who entered for his escheat or forfeiture, nor the husband who retained the possession as tenant by the curtesy, nor the wife to whom dower was assigned, were liable to perform the use, because they were not parties to the trust, but came in by act of law, though doubtless their title in reason was no better than that of the heir.

On the other hand **the use itself, or interest of cestuy que use**, was learnedly refined upon with many elaborate distinctions. And, 1. It was held that nothing could be granted to a use whereof the use is inseparable from the possession, as annuities, ways, commons, and authorities, *quae ipso usu consumuntur*,[6] or whereof the seisin could not be instantly given. 2. A use could not be raised without a sufficient consideration. For where a man makes a feoffment to another, without any consideration, equity presumes that he meant it to the use of himself, unless he expressly declares it to be to the use of another, and then nothing shall be presumed contrary to his own expressions. But if either a good or a valuable consideration appears, equity will immediately raise a use correspondent to such consideration. 3. Uses were descendible according to the rules of the common law in the case of inheritances in possession, for in this and many other respects *acquitas sequitur legem*, and cannot establish a different rule of property from that which the law has established. 4. Uses might be assigned by secret deeds between the parties, or be devised by last will and testament; for as the legal estate in the soil was not transferred by these transactions, no livery of seisin was necessary, and as the intention of the parties was the leading principle in this species of property, any instrument declaring that intention was allowed to be binding in equity. [331] But *cestuy que use* could not at common law aliene the legal interest of the lands without the concurrence of his feoffee, to whom he was accounted by law to be only tenant at sufferance. 5. Uses were not liable to any of the feodal burthens, and particularly did not escheat for

6. Which is consumed in the use itself.

felony or other defect of blood; for escheats, &c., are the consequence of *tenure,* and uses are *held* of nobody. But the land itself was liable to escheat whenever the blood of the feoffee to uses was extinguished by crime or by defect, and the lord (as was before observed) might hold it discharged of the use. 6. No wife could be endowed, or husband have his curtesy, of a use, for no trust was declared for their benefit at the original grant of the estate; and therefore it became customary, when most estates were put in use, to settle before marriage some joint estate to the use of the husband and wife for their lives, which was the original of modern jointures. 7. A use could not be extended by writ of *elegit,* or other legal process, for the debts of *cestuy que use;* for, being merely a creature of equity, the common law, which looked no farther than to the person actually seised of the land, could award no process against it.

[On account of the inconveniences arising from the rules above stated, various statutes were enacted, the provisions of which] all tended to consider *cestuy que use* as the real owner of the estate, and at length that idea was carried into full effect by the **statute 27 Hen. VIII. c. 10, which is usually called the statute of uses,** or, in conveyances and pleadings, the statute *for transferring uses into possession,* which, after reciting the various inconveniences before mentioned and many others, enacts, that "when any person shall be *seised* of lands, &c., to the use, confidence, or trust of any other person or body politic, the person or corporation entitled to the use in fee-simple, fee-tail for life, or years, or otherwise, shall from thenceforth stand and be seised or possessed of the land, &c., of and in the like estates as they have in the use, trust, or confidence, and that the estate of the person so seised to uses shall be deemed to be in him or them that have the use, in such quality, manner, form, and condition, as they had before in the use." [333] **The statute thus executes the use; that is, it conveys the possession to the use, and transfers the use into possession,** thereby making *cestuy que use* complete owner of the lands and tenements, as well at law as in equity.

The statute having thus not abolished the conveyance to uses, but only annihilated the intervening estate of the feoffee, and turned the interest of *cestuy que use* into a legal instead of an equitable ownership, **the courts of common law began to take cognizance of uses,** instead of sending the party to seek his relief in chancery. And, considering them now as merely a mode of conveyance, very many of the rules before established in equity were adopted with improvements by the judges of the common law. The same persons only were held capable of being seised to a use; the same considerations were necessary for raising it; and it could only be raised of the same hereditaments as formerly. But as the statute, the instant it was raised, converted it into an actual possession of the land, a great number of the incidents that formerly attended it in its fiduciary state were now at an end. The land could not escheat or be forfeited by the act or defect of the feoffee, nor be aliened to any purchaser discharged of the use, nor be liable to dower or curtesy on account of the seisin of such feoffee, because the legal estate never rests in him for a moment, but it is instantaneously transferred to *cestuy que use* as soon as the use is declared. And, as the use and the land were now convertible terms, they became liable to dower, curtesy, and escheat, in consequence of the seisin of *cestuy que use,* who was now become the *terre-tenant* also, and they likewise were no longer devisable by will.

The various necessities of mankind induced also the judges very soon to depart from the rigor and simplicity of the rules of the common law, and to allow a more minute and complex construction upon conveyances to uses than upon others. [334] Hence it was adjudged that the use need not always be executed the instant the conveyance is made, but, if it cannot take effect at that time, the operation of the statute may wait till the use shall arise upon some future contingency, to happen within a reasonable period of time, and in the mean while the ancient use shall remain in the original grantor; as, when lands are conveyed to the use of A and B, after a marriage shall be had between

them, or to the use of A and his heirs till B shall pay him a sum of money, and then to the use of B and his heirs, — which doctrine, when devises by will were again introduced and considered as equivalent in point of constructions to declarations of uses, was also adopted in favor of *executory devises*. But herein these, which are called **contingent, or springing uses,**[7] differ from an executory devise, in that

7. Mr. Sugden devotes a learned and instructive note, of considerable length (annexed to the second chapter of his edition of Gilbert on Uses), to an elucidation of this subject. Mr. Sugden says, shifting, secondary and springing uses, are frequently confounded with each other, and with future or contingent uses. They may perhaps be thus classed: 1st, *Shifting* or *secondary uses*, which take effect in derogation of some other estate, and are either limited expressly by the deed, or are authorized to be created by some person named in the deed. 2ndly, *Springing uses*, confining this class to uses limited to arise on a future event, where no *preceding* use is limited, and which do not take effect in derogation of any other interest than that which results to the grantor, or remains in him, in the meantime. 3dly, *Future or contingent uses*, are properly uses to take effect as remainders; for instance, a use to the first unborn son of A., after a previous limitation to him for life, or for years, determinable on his life, is a future or contingent use; but yet does not answer the notion of either a shifting or a springing use. Contingent uses naturally arose, after the statute of 27 Hen. VIII., in imitation of contingent remainders.

The first class, that is, *shifting or secondary uses*, are at this day so common that they pass without observation. In every marriage settlement, the first use is to the owner in fee until marriage, and after the marriage to other uses. Here, the owner, in the first instance, takes the fee, which upon the marriage ceases, and the new use arises. But a shifting use cannot be limited on a shifting use; and shifting uses must be confined within such limits as are not to tend to a perpetuity. (See *ante*, chap. 11.) But a shifting use may be created after an estate-tail, to take effect at any period, however remote; because the tenant in tail for the time being may, by a recovery, defeat the shifting use.

As to the second class, or *springing uses*, before the statute of Hen. VIII. there was no mischief in an independent original springing use, to commence at a distant period, because the legal estate remained in the trustee. After the statute, too, the use was held to result to, or remain in, the person creating the future use, according to the mode of conveyance adopted, till the springing use arose. This resulting use the statute executed, so that the estate remained in the settlor till the period when the use was to rise; which might be at any time within the limits allowed by law, in case of an executory devise. When springing uses are raised by conveyances not operating by transmutation of possession, as such conveyances have only an equitable effect until the statute and use meet,

there must be a person seised to such uses at the time when the contingency happens, else they can never be executed by the statute; and therefore if the estate of the feoffee to such use be destroyed by alienation or otherwise before the contingency arises, the use is destroyed forever; whereas by an executory devise the freehold itself is transferred to the future devisee. And in both these cases a fee may be limited to take effect after a fee, because, though that was forbidden by the common law in favor of the lord's escheat, yet when the legal estate was not extended beyond one fee-simple, such subsequent uses (after a use in fee) were before the statute permitted to be limited in equity, and then the statute executed the legal estate in the same manner as the use before subsisted. It was also held that a use, though executed, may change from one to another by circumstances *ex post facto*, as if A makes a feoffment to the use of his intended wife and her eldest son for their lives, upon the marriage the wife takes the whole use in severalty, and upon the birth of a son the use is executed jointly in them both. [335] This is sometimes called a **secondary**, sometimes a **shifting use.** And whenever the use limited by the deed expires or cannot vest, it returns back to him who raised it, after such expiration or during such impossibility, and is styled a **resulting use.** As if a man makes a feoffment to the use of his intended

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a springing use may be limited by them at once; but where the conveyance is one which does operate by transmutation of possession (as a feoffment, fine, recovery or lease and release), two objects must be attended to, first, to convey the estate according to the rules of common law; secondly, to raise the use out of the seisin created by the conveyance. Now, the common law does not admit of a freehold being limited to commence *in futuro*. (See *ante*, p. 143.)

As to the third class, or *future* or *contingent uses*, where an estate is limited previously to a future use, and the future use is limited by way of remainder, it will be subject to the rules of common law, and, if the previous estate is not sufficient to support it, will be void. (See *ante*, p. 168.)

Future uses have been countenanced, and springing uses restrained, by what is now a firm rule of law, namely, that if such a construction can be put upon a limitation in use, as that it *may* take effect by way of remainder, it shall never take effect as a springing use. (Southcot v. Stowel, 1 Mod. 226, 237; 2 Mod. 207; Goodtitle v. Billington, Dougl. 758.)

wife for life, with remainder to the use of his first-born son in tail; here, till he marries, the use results back to himself; after marriage, it is executed in the wife for life; and, if she dies without issue, the whole results back to him in fee. It was likewise held that the uses originally declared may be revoked at any future time, and new uses be declared of the land, provided the grantor reserved to himself such a power at the creation of the estate; whereas the utmost that the common law would allow was a deed of defeasance coeval with the grant itself, and therefore esteemed a part of it, upon events specially mentioned. And, in case of such a revocation, the old uses were held instantly to cease, and the new ones to become executed in their stead.

By this equitable train of decisions in the courts of law, the power of the Court of Chancery over landed property was greatly curtailed and diminished. But one or two technical scruples, which the judges found it hard to get over, restored it with tenfold increase. They held, in the first place, that "**no use could be limited on a use,**" and that when a man bargains and sells his land for money, which raises a use by implication to the bargainee, the limitation of a further use to another person is repugnant, and therefore void. [336] And therefore on a feoffment to A and his heirs to the use of B and his heirs in trust for C and his heirs, they held that the statute executed only the first use, and that the second was a mere nullity, not adverting that the instant the first use was executed in B, he became seised to the use of C, which second use the statute might as well be permitted to execute as it did the first, and so the legal estate might be instantaneously transmitted down through a hundred uses upon uses, till finally executed in the last *cestuy que use*. Again, **as the statute mentions only such persons as were seised to the use of others, this was held not to extend to terms of years or other chattel interests whereof the termor is not seised, but only possessed,** and therefore if a term of one thousand years be limited to A, to the use of (or in trust for) B, the statute does not execute this use, but leaves it as at common law. And lastly (by more modern resolutions), **where**

lands are given to one and his heirs in trust to receive and pay over the profits to another, this use is not executed by the statute, for the land must remain in the trustee to enable him to perform the trust.

Of the two more ancient distinctions the courts of equity quickly availed themselves. In the first case it was evident that B was never intended by the parties to have any beneficial interest, and in the second the *cestuy que use* of the term was expressly driven into the Court of Chancery to seek his remedy, and therefore that court determined, that though these were not uses which the statute could execute, yet still they were trusts in equity which in conscience ought to be performed. To this the reason of mankind assented, and the doctrine of uses was revived under the denomination of trusts, and thus by this strict construction of the courts of law a statute made upon great deliberation and introduced in the most solemn manner has had little other effect than to make a slight alteration in the formal words of a conveyance.

However, the courts of equity in the exercise of this new jurisdiction have wisely avoided in a great degree those mischiefs which made uses intolerable. [337] The statute of frauds, 29 Car. II. c. 3, having required that every declaration, assignment, or grant of any trust in lands or hereditaments (except such as arise from implication or construction of law) shall be made in writing signed by the party, or by his written will, the courts now consider a trust estate (either when expressly declared or resulting by such implication) as equivalent to the legal ownership, governed by the same rules of property, and liable to every charge in equity, which the other is subject to in law, and by a long series of uniform determinations, for now near a century past, with some assistance from the legislature, they have raised a new system of rational jurisprudence by which trusts are made to answer in general all the beneficial ends of uses without their inconvenience or frauds. The trustee is considered as merely the instrument of conveyance, and can in no shape affect the estate unless by alienation for a valuable consideration to a purchaser with-

out notice, which, as *cestuy que use* is generally in possession of the land, is a thing that can rarely happen. The trust will descend, may be aliened, is liable to debts, to executions on judgments, statutes, and recognizances (by the express provision of the statute of frauds), to forfeiture, to leases, and other incumbrances,— nay, even to the curtesy of the husband, as if it was an estate at law. It has not yet indeed been subjected to dower, more from a cautious adherence to some hasty precedents than from any well-grounded principle. It hath also been held not liable to escheat to the lord in consequence of attainder or want of heirs, because the trust could never be intended for his benefit. But let us now return to the statute of uses.

The only service, as was before observed, to which this statute is now consigned, is in giving efficacy to certain new and secret species of conveyances, introduced in order to render transactions of this sort as private as possible, and to save the trouble of making livery of seisin, the only ancient conveyance of corporal freeholds.[8] But this now has given way to

12. **A covenant to stand seised to uses is a conveyance by which a man seised of lands covenants in consideration of blood or marriage that he will stand seised of the same to the use of his child, wife, or kinsman, for life, in tail, or in fee.**[9] [338] Here the statute executes at once the estate, for the party intended to be benefited, having thus acquired the use, is thereby put at once into corporal possession of the land without ever seeing it, by a kind of parliamentary magic. But this conveyance can only operate when made upon such weighty and interesting considerations as those of blood or marriage.

13. **A conveyance by a bargain and sale of lands is a kind of real contract whereby the bargainor for some pecuniary**

8. The Statute of Uses is in force in many states, having been re-enacted or regarded as a part of the common law. Some states, however, following New York, have abolished all uses and trusts except as permitted in certain cases by statute, viz., trusts implied by law for the prevention of fraud and active trusts. See, generally, Hopkins, Real Prop., 252-289.

9. Practically obsolete in the United States. Hopkins, Real Prop., 410.

consideration bargains and sells, that is, contracts to convey the land to the bargainee, and becomes by such a bargain a trustee for, or seised to the use of the bargainee; and then the statute of uses completes the purchase, or, as it hath been well expressed, the bargain first vests the use, and then the statute vests the possession.[1] But as it was foreseen that conveyances thus made would want all those benefits of notoriety which the old common law assurances were calculated to give, to prevent, therefore, clandestine conveyances of freeholds, it was enacted in the same session of parliament, by statute 27 Hen. VIII. c. 16, that such bargains and sales should not inure to pass a freehold unless the same be made by indenture and *enrolled* within six months in one of the courts of Westminster Hall or with the *custos rotulorum* of the county. Clandestine bargains and sales of chattel interests, or leases for years, were thought not worth regarding, as such interests were very precarious till about six years before, which also occasioned them to be overlooked in framing the statute of uses, and therefore such bargains and sales are not directed to be enrolled. But how impossible is it to foresee and provide against all the consequences of innovations! [339] This omission has given rise to

14. **Conveyances by lease and release,** first invented by Serjeant Moore soon after the statute of uses, and now the most common of any, were thus contrived: A lease, or rather bargain and sale upon some pecuniary consideration, for one year is made by the tenant of the freehold to the lessee or bargainee. Now this, without any enrolment, makes the bargainor stand seised to the use of the bargainee, and vests in the bargainee the *use* of the term for a year, and then the statute immediately annexes the *possession*. He, therefore, being thus in possession, is

1. See Hopkins, Real Prop., 410. Many deeds in common use at the present time are in form deeds of bargain and sale. The statutes in many states have provided short forms of conveyance, either warranty deeds or quit-claim deeds; but the common law conveyances (except feoffments in some states) may still be employed, the statutory forms not being mandatory. Hopkins, Real Prop., 411. In Illinois title registration by the so-called Torrens system is optional. Id., 412.

capable of receiving a release of the freehold and reversion, which, we have seen before, must be made to a tenant in possession, and accordingly, the next day a release is granted to him. This is held to supply the place of livery of seisin, and so a conveyance by lease and release is said to amount to a feoffment.[2]

15. To these may be added **deeds to lead or declare the uses** of other more direct conveyances, as feoffments, fines, and recoveries, of which we shall speak in the next chapter; and

16. **Deeds of revocation of uses**, hinted at in a former page [335] and founded in a previous power, reserved at the raising of the uses to revoke such as were then declared and to appoint others in their stead, which is incident to the power of revocation. And this may suffice for a specimen of conveyances founded upon the statute of uses, and will finish our observations upon such deeds as serve to *transfer* real property.

Before we conclude, it will not be improper to subjoin a few remarks upon **such deeds as are used not to convey, but to charge or incumber lands, and to discharge them again**; of which nature are *obligations* or bonds, *recognizances*, and *defeasances* upon them both. [340]

1. **An obligation or bond is a deed whereby the obligor obliges himself, his heirs, executors, and administrators to pay a certain sum of money to another at a day appointed.** If this be all, the bond is called a single one, *simplex obligatio*.[3] But there is generally a condition added, that if the obligor does some particular act, the obligation shall be void, or else shall remain in full force; as payment of rent, performance of covenants in a deed, or repayment of a principal sum of money borrowed of the obligee with interest, which principal sum is usually one half of the penal sum specified in the bond. In case this condition is not performed, the bond becomes forfeited, or absolute at law, and charges the

2. This sort of a conveyance would undoubtedly be efficient to pass title at the present time; but as it requires the execution of two instruments, it has become obsolete. See Hopkins, Real Prop., 411.

3. A simple obligation.

obligor while living; and after his death the obligation descends upon his heir, who (on defect of personal assets) is bound to discharge it, provided he has real assets, by descent as a recompense. So that it may be called, though not a *direct*, yet a *collateral* charge upon the lands. How it affects the personal property of the obligor will be more properly considered hereafter.

If the condition of a bond be impossible at the time of making it, or be to do a thing contrary to some rule of law that is merely positive, or be uncertain or insensible, the condition alone is void, and the bond shall stand single and unconditional; for it is the folly of the obligor to enter into such an obligation, from which he can never be released. If it be to do a thing that is *malum in se*,[4] the obligation itself is void; for the whole is an unlawful contract, and the obligee shall take no advantage from such a transaction. And if the condition be possible at the time of making it, and afterwards becomes impossible by the act of God, the act of law, or the act of the obligee himself, there the penalty of the obligation is saved; for no prudence or foresight of the obligor could guard against such a contingency. [341] **On the forfeiture of a bond, or its becoming single, the whole penalty was formerly recoverable at law;** but here the courts of equity interposed, and would not permit a man to take more than in conscience he ought, viz., his principal, interest, and expenses, in case the forfeiture accrued by non-payment of money borrowed, the damages sustained upon non-performance of covenants, and the like. And the like practice having gained some footing in the courts of law, the statute 4 & 5 Anne, c. 16, at length enacted, in the same spirit of equity, that, in case of a bond conditioned for the payment of money, the payment or tender of the principal sum due, with interest and costs, even though the bond be forfeited and a suit commenced thereon, shall be a full satisfaction and discharge.[5]

2. **A recognizance is an obligation of record,** which a man

4. Bad in itself.

5. Bonds are in common use in this country not only to secure the payment of money but for manifold other lawful purposes. They may be executed not only by individuals, but are

enters into before some court of record or magistrate duly authorized, with condition to do some particular act, as to appear at the assizes, to keep the peace, to pay a debt, or the like. It is in most respects like another bond, the difference being chiefly this: that the bond is the creation of a fresh debt or obligation *de novo;*[6] the recognizance is an acknowledgment of a former debt upon record, the form whereof is 'that A B doth acknowledge to owe to our lord the king, to the plaintiff, to C. D, or the like, the sum of ten pounds," which condition to be void on performance of the thing stipulated; in which case the king, the plaintiff, C D, &c., is called the recognizee, "*is cui cognoscitur,*"[7] as he that enters into the recognizance is called the cognizor, "*is qui cognoscit.*"[8] This, being either certified to or taken by the officer of some court, is witnessed only by the record of that court, and not by the party's seal, so that it is not in strict propriety a deed, though the effects of it are greater than a common obligation, being allowed a priority in point of payment, and binding the lands of the cognizor from the time of enrolment on record.[9] [342]

There are also other recognizances, of a private kind, *in nature of a statute staple,* by virtue of the statute 23 Hen. VIII. c. 6, which have been already explained, and shown to be a charge upon real property.

3. A defeasance on a bond or recognizance, or judgment recovered, is a condition which, when performed, defeats

also a common means of securing corporate debts. The literature upon this subject is voluminous. See the title Bonds, Municipal Bonds, etc., in Bender's Law Catalogue (1914).

6. From the beginning or anew.

7. He to whom it is acknowledged.

8. He who acknowledges.

9. Signing is unnecessary at common law. A recognizance has priority in point of payment, over a common obligation; but a judgment, or decree (not being a mere interlocutory decree), takes place of a recognizance. (Littleton v. Hibbins, Cro. Eliz. 793; Searle v. Lane, 2 Freem. 104; s. c., 2 Vern. 89; Perry v. Phelps, 10 Ves. 34.) Between decrees and judgments, the right to priority of payment is determined by their real priority of date, without regard to the legal fiction of relation to the first day of Term. (Darston v. Earl of Oxford. 3 P. Wms. 401, n.; Joseph v. Mott, Prec. in Cha. 79; Morrice v. Bank of England, 3 Swanst. 577.)

or undoes it, in the same manner as a defeasance of an estate before mentioned.[1] It differs only from the common condition of a bond in that the one is always inserted in the deed or bond itself, the other is made between the same parties by a separate, and frequently a subsequent deed. This, like the condition of a bond, when performed, discharges and disincumbers the estate of the obligor.

1. Which see.

CHAPTER XXI.

OF ALIENATION BY MATTER OF RECORD.

Assurances by matter of record are such as do not entirely depend on the act or consent of the parties themselves, but the sanction of a court of record is called in to substantiate, preserve, and be a perpetual testimony of the transfer of property from one man to another, or of its establishment when already transferred. [344] Of this nature are, 1. Private acts of parliament; 2. The king's grants; 3. Fines; 4. Common recoveries.

I. **Private acts of parliament** are, especially of late years, become a very common mode of assurance.[1]

For it may sometimes happen that, by the ingenuity of some and the blunders of other practitioners, an estate is most grievously entangled by a multitude of contingent remainders, resulting trusts, springing uses, executory devises, and the like artificial contrivances,—a confusion unknown to the simple conveyances of the common law,—so that it is out of the power of either the courts of law or equity to relieve the owner. Or it may sometimes happen that by the strictness or omissions of family-settlements the tenant of the estate is abridged of some reasonable power (as letting leases, making a jointure for a wife, or the like), which power cannot be given him by the ordinary judges either in common law or equity. Or it may be necessary in settling an estate to secure it against the claims of infants or other persons under legal disabilities who are not bound by any judgments or decrees of the ordinary courts of justice. In these or other cases of the like kind the transcendent power of parliament is called in to cut the Gordian knot, and by a particular law, enacted for this very purpose, to unfetter an estate, to give its tenant reasonable powers, or to assure it to a purchaser against,

1. Not in use in this country as a mere private mode of conveyance, though the legislature may, where not prohibited by constitutional provisions, interfere in special cases of persons under disability by statutes empowering guardians and other trustees to sell lands in cases where the general laws are not applicable or do not accomplish fully all that in some cases seems desirable. See the subject fully considered in Cooley's Const. Lim. (7th Ed.), 140-151 and notes.

Statutes may convey public lands as in case of grants in aid of railroads and for other public purposes, either directly or they may prescribe rules and regulations for passing the title or may authorize the issuance of patents therefor, etc.

the remote or latent claims of infants or disabled persons, by settling a proper equivalent in proportion to the interest so barred. [345]

A law thus made, though it binds all parties to the bill, is yet looked upon rather as a private conveyance than as the solemn act of the legislature. [346] It is not, therefore, allowed to be a *public*, but a mere *private* statute; it is not printed or published among the other laws of the session; it hath been relieved against when obtained upon fraudulent suggestions; it hath been holden to be void if contrary to law and reason; and no judge or jury is bound to take notice of it unless the same be specially set forth and pleaded to them. It remains, however, enrolled among the public records of the nation, to be forever preserved as a perpetual testimony of the conveyance or assurance so made or established.

II. **The king's grants** are also matter of public record. These grants, whether of lands, honors, liberties, franchises, or aught besides, are contained in charters or **letters patent,** that is, open letters, *literae patents;* so called because they are not sealed up, but exposed to open view, with the great seal pendant at the bottom, and are usually directed or addressed by the king to all his subjects at large.[2]

As to the construction of the king's grants when made. 1. A grant made by the king *at the suit of the grantee* shall be taken most beneficially *for* the king and *against* the party; whereas the grant of a subject is construed most strongly *against the grantor.*[3] Wherefore it is usual to insert in the king's grants that they are made, not at the suit of the grantee, but "*ex speciali gratia, certa scientia, et mero motu regis,*"[4] and then they have a more liberal construction. 2. A subject's grant shall be construed to include many things besides what are expressed, if necessary for the operation of the grant. Therefore in a private grant of the profits of land for one year, free ingress, egress, and regress, to cut

2. See preceding note. A patent is the formal method of conveying public land entered under the United States homestead and other laws authorizing private entry of public lands. It is signed by the president of the United Stated or by some one authorized to act for him and sealed with the seal of the United States. See, generally, Hopkins, Real Prop., 402, 404. Patents for public lands of the several states are executed in the same manner but are signed by the governor and bear the state seal.

3. This is a general rule of construction.

4. By special favor, certain knowledge and mere motion of the king.

and carry away those profits, are also inclusively granted. But the king's grant shall not inure to any other intent than that which is precisely expressed in the grant. As, if he grants land to an alien, it operates nothing; for such grant shall not also inure to make him a denizen, that so he may be capable of taking by grant. [348] 3. When it appears from the face of the grant that the king is mistaken or deceived, either in matter of fact or matter of law, as in case of false suggestion, misinformation, or misrecital of former grants; or if his own title to the thing granted be different from what he supposes; or if the grant be informal; or if he grants an estate contrary to the rules of law, — in any of these cases the grant is absolutely void. For instance, if the king grants lands to one and his *heirs male,* this is merely void; for it shall not be an estate-tail, because there want words of procreation, to ascertain the body out of which the heirs shall issue. Neither is it a fee-simple, as in common grant it would be, because it may reasonably be supposed that the king meant to give no more than an estate-tail; the grantee is therefore (if anything) nothing more than tenant at will.[5]

III. **A fine of lands and tenements.**

1. **A fine may be described to be an amicable composition or agreement of a suit, either actual or fictitious, by leave of the king or his justices, whereby the lands in question become, or are acknowledged to be, the right of one of the parties.** [349] In its original it was founded on an actual suit, commenced at law for recovery of the possession of land or other hereditament, and the possession thus gained by such composition was found to be so sure and effectual that fictitious actions were, and continue to be every day commenced, for the sake of obtaining the same security.

The manner in which they should be levied or carried on is as follows: (1) **The party to whom the land is to be conveyed or assured commences an action** or suit at law against the other,—generally an action of covenant,—by suing out a writ of *praecipe,* called a writ of covenant, the foundation of which is a supposed agreement or covenant that the

5. This method of conveyance has become entirely obsolete in the United States. See Hopkins, Real Prop., 51.

one shall convey the lands to the other, on the breach of which agreement the action is brought. [350] The suit being thus commenced, then follows,

(2) **The licentia concordandi,** or leave to agree the suit. For as soon as the action is brought, the defendant, knowing himself to be in the wrong, is supposed to make overtures of peace and accommodation to the plaintiff, who, accepting them, but having, upon suing out the writ, given pledges to prosecute his suit, which he endangers if he now deserts it without license, he therefore applies to the court for leave to make the matter up.

(3) **Next comes the concord,** or agreement itself, after leave obtained from the court, which is usually an acknowledgment from the deforciants, or those who keep the other out of possession, that the lands in question are the right of the complainant. And from this acknowledgment or recognition of right the party levying the fine is called the *cognizor*, and he to whom it is levied the *cognizee*. [351] This acknowledgment must be made either openly in the Court of Common Pleas or before the Lord Chief Justice of that court, or else before one of the judges of that court, or two or more commissioners in the country, empowered by a special authority called a writ of *dedimus potestatem*,[6] which judges and commissioners are bound by statute, 18 Edw. I. st. 4, to take care that the cognizors be of full age, sound memory, and out of prison. If there be any feme-covert among the cognizors, she is privately examined whether she does it willingly and freely, or by compulsion of her husband.

By these acts all the essential parts of a fine are completed, and if the cognizor dies the next moment after the fine is acknowledged, provided it be subsequent to the day on which the writ is made returnable, still the fine shall be carried on in all its remaining parts; of which the next is

(4) **The note of the fine,** which is only an abstract of the writ of covenant, and the concord, naming the parties, the parcels of land, and the agreement. This must be enrolled of record in the proper office, by direction of the statute 5 Hen. IV. c. 14.

(5) **The fifth part is the foot of the fine,** or conclusion of it, which includes the whole matter, reciting the parties, day, year, and place, and before whom it was acknowledged or levied. Of this there are indentures made or engrossed at the chirographer's office, and delivered to the cognizor and the cognizee, usually beginning thus, "*haec est finalis concordia*, this is the final agreement," and then reciting the whole proceeding at length. And thus the fine is completely levied at common law.

2. **Fines thus levied are of four kinds:** 1. What in our law French is called **a fine "sur cognizance de droit, come ceo que il ad de son done,"** or a fine upon acknowledgment of the right of the cognizee, as that which he hath of the gift of the cognizor. [352] 2. **A fine "sur cognizance de droit tantum,"** or upon acknowledgment of the right merely,—

6. We give the authority.

not with the circumstance of a preceding gift from the cognizor. This is commonly used to pass a *reversionary* interest, which is in the cognizor. [353] 3. **A fine "sur concessit"**[7] is where the cognizor, in order to make an end of disputes, though he acknowledges no precedent right, yet grants to the cognizee an estate *de novo*, usually for life or years, by way of supposed composition. 4. **A fine "sur done, grant, et render,"** is a double fine, comprehending the fine *sur cognizance de droit come ceo*, &c., and the fine *sur concessit*, and may be used to create particular limitations of estate; whereas the fine *sur cognizance de droit come ceo*, &c., conveys nothing but an absolute estate, either of inheritance or at least of freehold.

3. **We are next to consider the force and effect of a fine.** These principally depend, at this day, on the common law and the two statutes, 4 Hen. VII. c. 24, and 32 Hen. VIII. c. 36. The ancient common law with respect to this point is very forcibly declared by the statute, 18 Edw. I., in these words: [354] "And the reason why such solemnity is required in the passing of a fine is this: because the fine is so high a bar, and of so great force, and of a nature so powerful in itself, that it precludes not only those which are parties and privies to the fine, and their heirs, but all other persons in the world who are of full age, out of prison, of sound memory, and within the four seas the day of the fine levied, unless they put in their claim on the foot of the fine within a year and a day;" [which by the statute of 4 Hen. VII. c. 24, was extended to five years after proclamations made, except as to] feme-coverts, infants, prisoners, persons beyond the seas, and such as are not of whole mind, who have five years allowed to them and their heirs after the death of their husbands, their attaining full age, recovering their liberty, returning into England, or being restored to their right mind.

The statute 32 Hen. VIII. c. 36, declares that a fine levied by any person of full age, to whom or to whose ancestors lands have been entailed, shall be a perpetual bar to them and their heirs claiming by force of such entail, unless the fine be levied by a woman after the death of her husband, of lands which were, by the gift of him or his ancestors, assigned to her in tail for her jointure, or unless it be of lands entailed by act of parliament or letters-patent, and whereof the reversion belongs to the crown. [355] From this view of the common law, regulated by these statutes, it appears that a fine is a solemn conveyance on record from the cognizor to the cognizee, and that **the persons bound by a fine are parties, privies, and strangers.**

The parties are either the cognizors or cognizees, and these are immediately concluded by the fine, and barred of any latent right they might have, even though under the legal impediment of coverture. And, indeed, as this is almost the only act that a **feme-covert,** or married woman, is permitted by law to do (and that because she is privately

7. In the grant.

examined as to her voluntary consent, which removes the general suspicion of compulsion by her husband), it is therefore the usual and almost the only safe method whereby she can join in the sale, settlement, or incumbrance of any estate.

Privies to a fine are such as are any way related to the parties who levy the fine and claim under them by any right of blood or other right of representation. Such as are the heirs general of the cognizor, the issue in tail since the statute of Henry VIII., the vendee, the devisee, and all others who must make title by the persons who levied the fine.

Strangers to a fine are all other persons in the world, except only parties and privies. [356] And these are also bound by a fine, unless, within five years after proclamations made, *they interpose their claim*, provided they are under no legal impediments, and have then a present interest in the estate. The impediments, as hath before been said, are coverture, infancy, imprisonment, insanity, and absence beyond sea; and persons who are thus incapacitated to prosecute their rights have five years allowed them to put in their claims after such impediments are removed. Persons also that have not a present but a future interest only, as those in remainder or reversion, have five years allowed them to claim in, from the time that such right accrues. And if within that time they neglect to claim, or (by the statute 4 Anne, c, 16) if they do not bring an action to try the right within one year after making such claim, and prosecute the same with effect, all persons whatsoever are barred of whatever right they may have, by force of the statute of non-claim.

But, in order to make a fine of any avail at all, it is necessary that the parties should have some interest or estate in the lands to be affected by it. Else it were possible that two strangers, by a mere confederacy, might without any risk defraud the owners by levying fines of their lands; for if the attempt be discovered, they can be no sufferers, but must only remain *in statu quo:*[8] whereas if a tenant for life levies a fine, it is an absolute forfeiture of his estate to the remainder-man or reversioner, if claimed in proper time. It is not, therefore, to be supposed that such tenants will frequently run so great a hazard; but if they do, and the claim is not duly made within five years after their respective terms expire, the estate is for ever barred by it. Yet where a *stranger*, whose presumption cannot be thus punished, officiously interferes in an estate which in nowise belongs to him, his fine is of no effect, and may at any time be set aside (unless by such as are parties or privies thereunto) by pleading that "*partes finis nihil habuerunt.*" [357] And even if a tenant for years, who hath only a chattel interest and no freehold in the land, levies a fine, it operates nothing, but is liable to be defeated by the same plea. Wherefore, when a lessee for years is disposed to levy a fine, it is usual for him to make a feoffment first to displace the estate of the reversioner, and create a new freehold by disseisin.

8. In the same state as before.

IV. **Common recoveries**[9] were invented by the ecclesiastics to elude the statutes of mortmain, and afterwards, encouraged by the finesse of the courts of law in 12 Edw. IV., in order to put an end to all fettered inheritances, and bar not only estates-tail, but also all remainders and reversions expectant thereon.

1. **A common recovery is so far like a fine that it is a suit or action, either actual or fictitious, and in it the lands are recovered against the tenant of the freehold, — which recovery, being a supposed adjudication of the right, binds all persons, and vests a free and absolute fee-simple in the recoveror.**

Let us suppose David Edwards to be tenant of the freehold, and desirous to suffer a common recovery in order to bar all entails, remainders, and reversions, and to convey the same in fee-simple to Francis Golding. [358] To effect this, Golding is to bring an action against him for the lands; and he accordingly sues out a writ called a *praecipe quod reddat*,[1] because those were its initial or most operative words when the law proceedings were in Latin. In this writ the demandant, Golding, alleges that the defendant Edwards (here called the tenant) has no legal title to the land, but that he came into possession of it after one Hugh Hunt had turned the demandant out of it. The subsequent proceedings are made up into a record or recovery roll, in which the writ and complaint of the demandant are first recited; whereupon the tenant appears and calls upon one Jacob Morland, who is supposed at the original purchase to have warranted the title to the tenant, and thereupon he prays that the said Jacob Morland may be called in to defend the title which he so warranted. This is called the *voucher*, *vocatio*, or calling of Jacob Morland to warranty, and Morland is called the *vouchee*. Upon this Jacob Morland, the vouchee, appears, is impleaded, and defends the title. Whereupon Golding, the demandant, desires leave of the court to *imparl*, or confer with the vouchee in private, which is (as usual) al-

9. See in general, Com. Dig. Recovery; Bac. Ab. Fines and Recoveries; 1 Prest. on Conv., 1 vol. 1 to 200; Cru. Dig. index, Recovery; Cruise on Fines and Recoveries; Fearne's Con. Rem.; Vin. Ab. Recovery; 5 T. R. 107, n.; 2 Saund. 42, n. 7, and id. index, tit. Recovery; and as to pleading a recovery, see 2 Chitty on Pleadings (4th Ed.), 582 to 586, where the nature and operation of common recoveries is stated and explained. Common recoveries are entirely obsolete in the United States. Both fines and common recoveries have, however, so much general interest to the scholarly lawyer that space has been here given to their treatment.

1. Command him to restore.

lowed him. And soon afterwards the demandant, Golding, returns to court, but Morland, the vouchee, disappears, or makes default. Whereupon judgment is given for the demandant, Golding, now called the recoveror, to recover the lands in question against the tenant, Edwards, who is now the recoveree; and Edwards has judgment to recover of Jacob Morland lands of equal value, in recompense for the lands so warranted by him, and now lost by his default, which is agreeable to the doctrine of warranty. [359] This is called the recompense, or *recovery in value*. But Jacob Morland having no lands of his own, being usually the crier of the court (who, from being frequently thus vouched, is called the *common vouchee*), it is plain that Edwards has only a nominal recompense for the land so recovered against him by Golding, which lands are now absolutely vested in the said recoveror by judgment of law, and seisin thereof is delivered by the sheriff of the county. So that this collusive recovery operates merely in the nature of a conveyance in fee-simple from Edwards, the tenant in tail, to Golding, the purchaser.

The recovery here described is with a single voucher only; but sometimes it is with *double, treble,* or further voucher, as the exigency of the case may require. And indeed it is now usual always to have a recovery with double voucher at the least, by first conveying an estate of freehold to any indifferent person against whom the *praecipe* is brought, and then he vouches the tenant in tail, who vouches over the common vouchee. For if a recovery be had immediately against tenant in tail, it bars only such estate in the premises of which he is then actually seised; whereas if the recovery be had against another person, and the tenant in tail be vouched, it bars every latent right and interest which he may have in the lands recovered. If Edwards, therefore, be tenant of the freehold in possession, and John Barker be tenant in tail in remainder, here Edwards doth first vouch Barker, and then Barker vouches Jacob Morland, the common vouchee, who is always the last person vouched, and always makes default; whereby the demandant, Golding, recovers the land against the tenant, Edwards, and Edwards recovers a recompense of equal value against Barker, the first vouchee, who recovers the like against Morland, the common vouchee against whom such ideal recovery in value is always ultimately awarded.

This supposed recompense in value is the reason why the issue in tail is held to be barred by a common recovery. [360] For if the recoveree should obtain a recompense in lands from the common vouchee (which there is a possibility in contemplation of law, though a very improbable one, of his doing), these lands would supply the place of those so recovered from him by collusion, and would descend to the issue in tail. This reason will also hold with equal force as to *most* remainder men and reversioners, to whom the possibility will remain and revert as a full recompense for the realty, which they were otherwise entitled to; but it will not *always* hold, and therefore, as Pigot says, the judges have been even *astuti* in inventing other reasons to maintain the authority of recoveries. And in particular it hath been said that though the estate-

tail is gone from the recoveree, yet it is not *destroyed*, but *only transferred*, and still subsists, and will ever continue to subsist (by construction of law) in the recoveror, his heirs and assigns; and as the estate-tail so continues to subsist forever, the remainders or reversions expectant on the determination of such an estate-tail can never take place.

2. **The force and effect of common recoveries** may appear from what has been said to be an absolute bar, not only of all estates-tail, but of remainders and reversions expectant on the determination of such estates. So that a tenant in tail may by this method of assurance convey the lands held in tail to the recoveror, his heirs and assigns, absolutely free and discharged of all conditions and limitations in tail and of all remainders and reversions. But by statute 34 and 35 Hen. VIII. c. 20, no recovery had against tenant in tail of the king's gift, whereof the remainder or reversion is in the king, shall bar such estate-tail, or the remainder or reversion of the crown. And by the statute 11 Hen. VII. c. 20, no woman, after her husband's death, shall suffer a recovery of lands settled on her by her husband, or settled on her husband and her by any of his ancestors. [362] And by statute 14 Eliz. c. 8, no tenant for life of any sort can suffer a recovery so as to bind them in remainder or reversion. For which reason, if there be tenant for life, with remainder in tail and other remainders over, and the tenant for life is desirous to suffer a valid recovery, either he or the tenant to the *praecipe* by him made must *vouch* the remainder-man in tail, otherwise the recovery is void. But if he does vouch such remainder-man, and he appears and vouches the common vouchee, it is then good; for if a man be vouched and appears and suffers the recovery to be had against the tenant to the *praecipe*, it is as effectual to bar the estate-tail as if he himself were the recoveree.

In all recoveries it is necessary that the recoveree or tenant to the *praecipe*, as he is usually called, be actually seised of the freehold, else the recovery is void; for all actions to recover the seisin of lands must be brought against the actual tenant of the freehold, else the suit will lose its effect, since the freehold cannot be recovered of him who has it not.

Before I conclude this head, I must add a word concerning **deeds to lead or to declare the use of fines and of recoveries.** [363] For if they be levied or suffered without any good consideration, and without any uses declared, they, like other conveyances, inure only to the use of him who levies or suffers them. If these deeds are made previous to the fine or recovery, they are called deeds to *lead* the uses; if subsequent, deeds to *declare* them. As if A, tenant in tail, with reversion to himself in fee, would settle his estate on B for life, remainder to C in tail, remainder to D in fee, that is what by law he has no power of doing effectually while his own estate-tail is in being. He therefore usually, after making the settlement proposed, covenants to levy a fine, or, if there be any intermediate remainders, to suffer a recovery, to E, and directs that the same shall inure to the uses in such settlement mentioned. This

is now a deed to *lead* the uses of the fine or recovery, and the fine when levied, or recovery when suffered, shall inure to the uses so specified, and no other. For though E, the cognizee or recoverer, hath a fee simple vested in himself by the fine or recovery, yet by the operation of this deed he becomes a mere instrument or conduit-pipe, seised only *to the use* of B, C, and D in successive order, which use is executed immediately by force of the statute of uses. [364] Or if a fine or recovery be had without any previous settlement, and a deed be *afterwards* made between the parties, *declaring* the uses to which the same shall be applied, this will be equally good as if it had been expressly levied or suffered in consequence of a deed directing its operation to those particular uses. For by statute 4 and 5 Anne, c. 16, indentures to *declare* the uses of fines and recoveries, made *after* the fines and recoveries had and suffered, shall be good and effectual in law, and the fine and recovery shall inure to such uses and be esteemed to be only in trust, notwithstanding any doubts that had arisen on the statute of frauds, 29 Car. II. c. 3, to the contrary.

CHAPTER XXII.

OF ALIENATION BY SPECIAL CUSTOM.[1]

We are next to consider assurances by special custom, obtaining only in particular places, and relative only to a particular species of real property. [365] This, therefore, is a very narrow title, being **confined to copyhold lands and such customary estates as are holden in ancient demesnes or in manors of a similar nature,** which being of a very peculiar kind, and originally no more than tenancies in pure or privileged villenage, were never alienable by deed, for as that might tend to defeat the lord of his seigniory, it is therefore a forfeiture of a copyhold. Nor are they transferable by matter of record, even in the king's courts, but only in the court baron of the lord. The method of doing this is generally by *surrender*, though in some manors, by special custom, recoveries may be suffered of copyholds; but these differing in nothing material from recoveries of free land, save only that they are not suffered in the king's courts, but in the court baron of the manor, I shall confine myself to conveyances by surrender and their consequences.

Surrender, *sursumredditio*, is the yielding up of the estate by the tenant into the hands of the lord for such purposes as in the surrender are expressed: as, it may be, to the use and behoof of A and his heirs; to the use of his own will; and the like. The process in most manors is that the tenant comes to the steward, either in court or, if the custom permits, out of court, or else to two customary tenants of the same manor, provided there be also a custom to warrant it, and there, by delivering up a rod, a glove, or other symbol, as the custom directs, resigns into the hands of the lord, by the hands and acceptance of his said steward, or of the said two tenants, all his interest and title to the estate, in trust to be again granted out by the lord to such persons and for such uses as are named in the surrender and the custom of the manor will warrant. [366] If the surrender be made out of court, then at the next or some subsequent court the jury or homage must present and find it upon their oaths, which presentment is an information to the lord or his steward of what has been transacted out of court. Immediately upon such surrender in court, or upon presentment of a surrender made out of court, the lord by his steward grants the same land again to *cestuy que*

1. Although we have no copyhold lands in this country and therefore this chapter has no application here, still its historical value warrants its preservation in finer type. See in general, Com. Dig.; Bac. Ab.; Vin. Ab. Copyhold; Cru. Dig. index, Copyhold; 1 Prest. on Conv. index, Copyhold; Watkins on Copyhold, and Scriven on Copyhold; 2 Saund. index, tit. Copyhold, and tit. Surrenders; and 1 Thomas Co. Lit. 653 to 676.

use,—who is sometimes, though rather improperly, called the surrenderee,—to hold by the ancient rents and customary services, and thereupon admits him tenant to the copyhold, according to the form and effect of the surrender, which must be exactly pursued. And this is done by delivering up to the new tenant the rod, or glove, or the like, in the name and as the symbol of corporal seisin of the lands and tenements,—upon which admission he pays a fine to the lord according to the custom of the manor, and takes the oath of fealty.

This method of conveyance is so essential to the nature of a copyhold estate, that it cannot properly be transferred by any other assurance. No feoffment of grant has any operation thereupon. If I would exchange a copyhold estate with another, I cannot do it by an ordinary deed of exchange at the common law, but we must surrender to each other's use, and the lord will admit us accordingly. If I would devise a copyhold, I must surrender it to the use of my last will and testament, and in my will I must declare my intentions and name a devisee, who will then be entitled to admission. [368] A fine or recovery had of copyhold lands in the king's court may, indeed, if not duly reversed, alter the tenure of the lands and convert them into frank fee, which is defined in the old book of tenures to be "land pleadable at the common law;" but upon an action on the case, in the nature of a writ of *deceit*, brought by the lord in the king's court, such fine or recovery will be reversed, the lord will recover his jurisdiction, and the lands will be restored to their former state of copyhold.

1. **A surrender,** by an admittance subsequent whereto the conveyance is to receive its perfection and confirmation, is rather a manifestation of the alienor's intention than a transfer of any interest in possession. For, till admittance of *cestuy que use*, the lord taketh notice of the surrenderor as his tenant, and he shall receive the profits of the land to his own use, and shall discharge all services due to the lord. Yet the interest remains in him not absolutely, but *sub modo;* for he cannot pass away the land to any other, or make it subject to any other incumbrance than it was subject to at the time of the surrender. But no manner of legal interest is vested in the nominee before admittance. If he enters, he is a trespasser and punishable in an action of trespass, and if he surrenders to the use of another, such surrender is merely void, and by no matter *ex post facto*[2] can be confirmed. Yet though upon the original surrender the nominee hath but a possibility, it is, however, such a possibility as may whenever he pleases be reduced to a certainty, for he cannot either by force or fraud be deprived or deluded of the effects and fruits of the surrender. But if the lord refuse to admit him, he is compellable to do it by a bill in chancery or a *mandamus*,[3] and the surrender can in no wise defeat his grant, his hands being forever bound from disposing of the land in any other way, and his mouth forever stopped from revoking or countermanding his own deliberate act. [369]

2. Happening afterwards. 3. We command.

2. As to the **presentment:** that, by the *general* custom of manors, is to be made at the next court baron immediately after the surrender, but by *special* custom in some places it will be good, though made at the second or other subsequent court. And it is to be brought into court by the *same* persons that took the surrender, and then to be presented by the homage, and in all points material must correspond with the true tenor of the surrender itself. And, therefore, if the surrender be conditional and the presentment be absolute, both the surrender, presentment, and admittance thereupon are wholly void,—the surrender as being never truly presented, the presentment as being false, and the admittance as being founded on such untrue presentment.

3. **Admittance** is the last stage or perfection of copyhold assurance. [370] And this is of three sorts: first, as admittance upon a voluntary grant from the lord; secondly, an admittance upon surrender by the former tenant; and thirdly, an admittance upon a descent from the ancestor.

In admittances, even upon a *voluntary grant* from the lord, when copyhold lands have escheated or reverted to him, the lord is considered as an instrument. For though it is in his power to keep the lands in his own hands, or to dispose of them at his pleasure by granting an absolute fee-simple, a freehold, or a chattel interest therein, and quite to change their nature from copyhold to socage tenure, so that he may well be reputed their absolute owner and lord, yet if he will still continue to dispose of them as copyhold, he is bound to observe the ancient custom precisely in every point, and can neither in tenure nor estate introduce any kind of alteration, for that were to create a new copyhold; wherefore in this respect the law accounts him custom's instrument.

In admittances upon *surrender* of another, the lord is to no intent reputed as owner, but wholly as an instrument, and the tenant admitted shall likewise be subject to no charges or incumbrances of the lord; for his claim to the estate is solely under him that made the surrender.

And as in admittances upon surrender, so in admittances *upon descents*, by the death of the ancestor the lord is used as a mere instrument, and as no manner of interest passes into him by the surrender or the death of his tenant, so no interest passes out of him by the act of admittance. [371] And therefore neither in the one case nor the other is any respect had to the quantity or quality of the lord's estate in the manor. For whether he be tenant in fee or for years, whether he be in possession by right or by wrong, it is not material, since the admittances made by him shall not be impeached on account of his title, because they are judicial, or rather ministerial acts, which every lord in possession is bound to perform.

Admittances, however, upon surrender differ from admittances upon descent in this, that by surrender nothing is vested in *cestuy que use* before admittance, no more than in voluntary admittances; but upon dissent the heir is tenant by copy immediately upon the death of his

ancestor,—not indeed to all intents and purposes, for he cannot be sworn on the homage nor maintain an action in the lord's court as tenant: but to most intents the law taketh notice of him as of a perfect tenant of the land instantly upon the death of his ancestor, especially where he is concerned with any stranger. He may enter into the land before admittance; may take the profits; may punish any trespass done upon the ground,—nay, upon satisfying the lord for his fine due upon the descent, may surrender into the hands of the lord to whatever use he pleases. By the custom of every manor, however, either upon pain of forfeiture of their copyhold or of incurring some great penalty, the heirs of copyholders are enforced to come into court and be admitted according to the custom, within a short time after notice given of their ancestor's decease. [372]

CHAPTER XXIII.

OF ALIENATION BY DEVISE.

The last method of conveying real property is by devise, or disposition contained in a man's last will and testament.[1] [373]

It seems sufficiently clear that before the Conquest lands were devisable by will. But upon the introduction of the military tenures, the restraint of devising lands naturally took place as a branch of the feodal doctrine of non-alienation without the consent of the lord. And by the common law of England since the Conquest, no estate greater than for term of years could be disposed of by testament, except only in Kent and in some ancient burghs, and a few particular manors where the Saxon immunities by special indulgence subsisted. [374] And though the feodal restraint on alienations by *deed* vanished very early, yet this on wills continued for some centuries after, from an apprehension of infirmity and imposition on the testator *in extremis,* which made such devises suspicious. [375]

But when ecclesiastical ingenuity had invented the doctrine of uses as a thing distinct from the land, uses began to be devised very frequently, and the devisee of the use could in chancery compel its execution. But when the statute of uses had annexed the possession to the use, these uses, being now the very land itself, became no longer devisable; which might have occasioned a great revolution in the law of devises, had not **the statute of wills** been made about five years after, viz., 32 Hen. VIII. c. 1, explained by 34 Hen. VIII. c. 5, which enacted that all persons being *seised in fee-simple* (except feme-coverts,[2] infants, idiots, and persons of non-sane memory) might by will and testament in writing devise to any other *person,* except to bodies corporate, two thirds of their lands, tenements, and hereditaments, held in chivalry, and

1. For definitions, see Schouler on Wills & Administration, introductory chapter, 1-3.

2. This disability has been removed by statute in some of the states. Consult the local statutes.

the whole of those held in socage; which now, through the alteration of tenures by the statute of Charles II., amounts to the whole of their landed property except their copyhold tenements.

Corporations were excepted in these statutes to prevent the extension of gifts in mortmain; but now, by construction of the statute 43 Eliz. c. 4, it is held that a devise to a corporation for a charitable use is valid, as operating in the nature of an *appointment* rather than of a *bequest*. [376]

With regard to devises in general, experience soon showed how difficult and hazardous a thing it is, even in matters of public utility, to depart from the rules of the common law. Innumerable frauds and perjuries were quickly introduced by this parliamentary method of inheritance; for so loose was the construction made upon this act by the courts of law, that bare notes in the handwriting of another person were allowed to be good wills within the statute. To remedy which **the statute of frauds and perjuries, 29 Car. II. c. 3,**[3] **directs that all devises of lands and tenements shall not only be in writing [printing will suffice], but signed**[4] **by the testator or some other person in his presence and by his express direction,**[5] **and be subscribed in his presence by three or four credible witnesses.**[5a] And a solemnity nearly similar is requisite for **revoking a devise** by writing, though the same may be also revoked by burning, cancelling, tearing, or obliterating thereof by the devisor,[6] or in his presence and with his consent; as likewise

3. This statute has furnished a model which has been followed more or less closely in probably all the states. The same formalities, as a rule, are required in a testament of chattels in this country as in the case of devises of land and tenements.

4. Some of the statutes require the will to be *subscribed*, that is, signed at the end of the will. Whatever the provisions it is good practice to have the testator attach his signature to *every page* of the will as well as at the end. Signature by mark or cross is a sufficient signing. Schouler on Wills, 146, 150 and notes.

5. The legal effect of this is the same as if written by the testator himself. Schouler on Wills, 148.

No seal is required in the absence of a special statute requiring a seal.

5a. In this country some of the states require only two witnesses. Consult the local statutes.

6. Provided it is done with the intention to revoke the will. Schouler on Wills, 188-198 and notes.

impliedly, by such a great and entire alteration in the circumstances and situation of the devisor as arises from marriage and the birth of a child.[7]

In the construction of this last statute, it has been adjudged that the testator's name written with his own hand at the beginning of his will, as: "I, John Mills, do make this my last will and testament:" is a **sufficient signing,** without any name at the bottom, though the other is the safer way.[8] [377] It has also been determined that, though **the witnesses** must all see the testator sign, or at least acknowledge the signing, yet they may do it at different times. But they must all subscribe their names as witnesses *in his presence,* lest by any possibility they should mistake the instrument.[9] And in one case, determined by the Court of King's Bench, the judges were extremely strict in regard to the credibility, or rather the competency, of the witnesses, for they would not allow any legatee, nor by consequence a creditor, where the legacies and debts were charged on the real estate, to be a competent witness to the devise, as being too deeply concerned in interest not to wish the establishment of the will, for, if it were established, he gained a security for his legacy or debt from the real estate, whereas otherwise he had no claim but on the personal assets. This occasioned the statute 25 Geo. II. c. 6, which restored both the competency and the credit of such *legatees,* by declaring void all legacies given to witnesses,

7. This rule has been adopted in many states though not in all. See Schouler on Wills, 206-209 and notes.

8. A different construction would prevail where the statute uses the word "subscribed." See note, *supra.*

9. The method of execution including the witnessing the testator sign and the number of and the manner in which the witnesses shall attest the will, are all variously prescribed by statute in the several states. The provisions of the statute should be fully complied with; for, as a will is operative only after the death of the testator, a mistake in this respect cannot be remedied.

Under the statute of Car. 2, publication was not necessary and it appears to be settled both in England and the United States that independent of statutory provision requiring publication, a will may be duly executed by a testator without any formal announcement of a testamentary purpose. Schouler on Wills, 154, 156, 157 and notes; Jarman on Wills (5th Ed.), p. *80; Id. (6th Ed.), p. *96.

and thereby removing all possibility of their interest affecting their testimony.[1] The same statute likewise established the competency of *creditors,* by directing the testimony of all such creditors to be admitted, but leaving their credit (like that of all other witnesses) to be considered, on a view of all the circumstances, by the court and jury before whom such will shall be contested. [378] And in a much later case the testimony of three witnesses who were creditors was held to be sufficiently credible, though the land was charged with the payment of debts, and the reasons given on the former determination were said to be insufficient.

Another inconvenience was found to attend this new method of conveyance by devise, in that **creditors by bond, and other specialties** which affected the *heir,* provided he had assets by descent, were now defrauded of their securities, not having the same remedy against the *devisee* of their debtor. To obviate which, the statute 3 & 4 W. & M. c. 14, hath provided that all wills and testaments, limitations, dispositions, and appointments of real estates, by tenants in fee-simple or having power to dispose by will, shall (as against such creditors only) be deemed to be fraudulent and void, and that such creditors may maintain their actions jointly against both the heir and the devisee.[2]

A will of lands made by the permission and under the control of these statutes is considered by the courts of law not so much in the nature of a testament as of a conveyance declaring the uses to which the land shall be subject: with this difference, that in other conveyances the actual **subscription of the witnesses** is not required by law, though it is prudent for them so to do, in order to assist their

1. As to the competency of attesting witnesses, see the local statutes. In most of the states witnesses to wills are by statute rendered incapable of taking any beneficial interest under the will, unless there be the statutory number of competent witnesses without them. Schouler on Wills, 174; 1 Jarman on Wills, 71, Bigelow's note; Stim. Am. Stat. Law, § 2650.

2. In this country the order of procedure in the payment of debts and claims against an estate is, as a rule, definitely settled by statute whether the estate be testate or intestate, and the claims of creditors of the deceased, whether by bond or otherwise, are prior to those of legatees and devisees. Consult local statutes.

memory when living, and to supply their evidence when dead; but in devises of land such subscription is now absolutely necessary by statute, in order to identify a conveyance which in its nature can never be set up till after the death of the devisor. And upon this notion, that **a devise affecting lands is merely a species of conveyance**, is founded this **distinction between such devises and testaments of personal chattels**, that the latter will operate upon whatever the testator dies possessed of, the former only upon such real estate as were his at the time of executing and publishing his will. Wherefore no after-purchased lands will pass under such devise unless, subsequent to the purchase or contract, the devisor republishes his will.[3] [379]

General rules and maxims for the construction and exposition of common assurances.

1. **That the construction be favorable, and as near the minds and apparent intents of the parties, as the rules of law will admit.**[4] For the maxims of law are, that "*verba intentioni debent inservire;*"[5] and "*benigne interpretamut chartas, propter simplicitatem laicorum.*"[6] And therefore the construction must also be *reasonable,* and agreeable to common understanding.

2. **That quoties in verbis nulla est ambiguitas ibi nulla expositio contra verba fienda est,**[7] but that where the *intention* is clear, too minute a stress be not laid on the strict and precise signification of *words; nam qui haeret in litera, haeret in cortice.*[8] Therefore, by a grant of a remainder a reversion may well pass, and *e converso.*[9] And another

3. In some of the states real property acquired after the execution of the will, will pass by such will, if such appears to be the intention of the testator. In others the common law rule to the contrary has been followed. See Hopkins, Real Prop., 474 and notes; 1 Stim. Am. St. Law, § 2634.

4. This is the universal and cardinal rule of construction. Schouler on Wills, 228.

5. Words ought to serve the intention.

6. We interpret deeds liberally on account of the simplicity of the laity. Co. Litt., 36a; Broom's Leg. Max., *48.

7. When there is no ambiguity in the words, there should be no construction contrary to the words.

8. For whoever sticks to the letter, sticks to the bark. Co. Litt., 283b; Broom's Leg. Max., *611.

9. Conversely.

maxim of law is, that *"mala grammatica non vitiat chartam;"*[1] neither false English nor bad Latin will destroy a deed.

3. **That the construction be made upon the entire deed,** and not merely upon disjointed parts of it. *"Nam ex antecedentibus et consequentibus fit optima interpretatio."*[2] And therefore that every part of it be (if possible) made to take effect, and no word but what may operate in some shape or other. *"Nam verba debent intelligi cum effectu, ut res magis valeat quem pereat.*[3] [380]

4. **That the deed be taken most strongly against him that is the agent or contractor, and in favor of the other party.** *"Verba fortius accipuntur contra proferentem."*[4] As, if tenant in fee-simple grants to any one an estate for life, generally it shall be construed an estate for the life of the grantee. But here a distinction must be taken between an indenture and a deed-poll; for the words of an indenture, executed by both parties, are to be considered as the words of them both; for, though delivered as the words of one party, yet they are not his words only, because the other party hath given his consent to every one of them. But in a deed-poll executed only by the grantor, they are the words of the grantor only, and shall be taken most strongly against him. And in general, this rule, being a rule of some strictness and rigor, is the last to be resorted to, and is never to be relied upon but where all other rules of exposition fail.

5. **That if the words will bear two senses, one agreeable to and another against law, that sense be preferred which is most agreeable thereto.** As if tenant in tail lets a lease to have and to hold during life generally, it shall be construed to be a lease for his own life only, for that stands with the law; and not for the life of the lessee, which is beyond his power to grant.

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1. Incorrect grammar does not vitiate a deed.

2. The best interpretation is made from both the antecedent and following parts.

3. Words ought to be understood with effect that the matter may be strengthened rather than perish.

4. Words are to be construed more strongly against the one using them. Co. Litt., 36a; Broom's Leg. Max., *529.

6. **That in a deed if there be two clauses so totally repugnant to each other that they cannot stand together, the first shall be received and the latter rejected:** wherein it differs from a will; for there, of two such repugnant clauses the latter shall stand. [381] Which is owing to the different natures of the two instruments, for the first deed and the last will are always most available in law.[5] Yet in both cases we should rather attempt to reconcile them.

7. **That a devise be most favorably expounded to pursue, if possible, the will of the devisor,** who for want of advice or learning may have omitted the legal or proper phrases; and therefore many times the law dispenses with the want of words in devises that are absolutely requisite in all other instruments.[6] Thus, a fee may be conveyed without words

5. Such was held to be the law in the time of Lord Coke. (See accordingly 6 Ves. 102, 5 Ves. 247, 407.) But now where the same estate is devised to A. in fee, and afterwards to B. in fee in the same will, they are construed to take the estate as joint-tenants, or tenants in common, according to the limitations of the estates and interests devised. 3 Atk. 493; Harg. Co. Litt., 112b, n. 1.

6. In the celebrated case of Perrin v. Blake, Burr. 2579, the question was, whether the manifest intention of the testator to give to the first taker an estate for life only ought to prevail, or that he should have an estate-tail from the construction which would have clearly been put upon the same words if they had been used in a deed? The devise in substance was as follows: The testator declared, it is my intent and meaning, that none of my children should sell or dispose of my estate for longer term than his own life; and *to that intent* I give my son John Williams my estate during his natural life, remainder to my brother-in-law during the life of my son John Williams (the design of that being to support the contingent remainder); remainder to the heirs of the body of John Williams. Lord Mansfield and two other judges of the court of king's bench determined, that John Williams took an estate for life only; but upon a writ of error to the exchequer-chamber, the decision was reversed, and six out of eight of the other judges held, that John Williams took an estate-tail, which of consequence gave him an absolute power of *selling or disposing of* the estate as he pleased. It has since been observed by a learned judge, that as one of the judges held that John Williams took an estate-tail, because he was of opinion that such might be presumed to be the testator's intention, no argument in future can be drawn from this case; because one-half of the judges relied upon the ground of intention alone. It is the first and great rule in the exposition of wills, and to which all other rules must bend, that the intention of the testator, expressed in his will, shall prevail, provided it be *consistent with the rules of law;*

of inheritance, and an estate-tail without words of procreation. By a will also an estate may pass by mere implication, without any express words to direct its course. As where a man devises lands to his heir at law after the death of his wife: here, though no estate is given to the wife in express terms, yet she shall have an estate for life by implication, for the intent of the testator is clearly to postpone the heir till after her death, and if she does not take it, nobody else can. So also where a devise is of black-acre to A and of white-acre to B in tail, and if they both die without issue, then to C in fee: here A and B have *cross-remainders* by implication, and on the failure of either's issue the other or his issue shall take the whole, and C's remainder over shall be postponed till the issue of both shall fail. And in general, where any implications are allowed, they must be such as are *necessary* (or at least highly *probable*), and not merely *possible* implications. [382] And herein there is no distinction between the rules of law and of equity; for the will, being considered in both courts in the light of a limitation of uses, is construed in each with equal favor and benignity, and expounded rather on its own particular circumstances than by any general rules of positive law.

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that is, provided it can be effectuated consistently with the limits and bounds which the law prescribes. To argue that the intention shall be frustrated by a *rule of construction of certain words*, is to say that the intention shall be defeated by the use of the very words which the testator has adopted as the best to communicate his intention, and of which the sense is intelligible to all mankind. See, also, Co. Litt., 376b, note 1, by Mr. Butler; 4 Ves. Jr. 412; 2 Ves. 248; 3 Bro. C. C. 61.

CHAPTER XXIV.

OF THINGS PERSONAL.

Under the name of things personal are included all sorts of things movable, which may attend a man's person wherever he goes. [384]

But things personal by our law do not only include things *movable,* but also something more, the whole of which is comprehended under the general name of **chattels**, which, Sir Edward Coke says, is a French word signifying goods. [385] The appellation is in truth derived from the technical Latin word *catalla,* which primarily signified only beasts of husbandry, or (as we still call them) *cattle,* but in its secondary sense was applied to all movables in general. In the *Grand Coustumier* of Normandy a *chattel* is described as a mere movable, but at the same time it is set in opposition to a fief or feud; so that **not only goods, but whatever was not a feud, were accounted chattels.** And it is in this latter, more extended, negative sense that our law adopts it; the idea of goods, or movables only, being not sufficiently comprehensive to take in everything that the law considers as a chattel interest.[1] [386] For since, as the commentator on the *Coustumier* observes, there are two requisites to make a fief or heritage: duration as to time, and immobility with regard to place; whatever wants either of these qualities is not, according to the Normans, an heritage, or fief; or, according to us, is not a *real* estate: the consequence of which in both laws is that it must be a personal estate, or chattel.

Chattels, therefore, are distributed by the law into two kinds, chattels *real,* and chattels *personal.*

1. **Chattels real are such as concern, or savor of, the realty,** as terms for years of land, wardships in chivalry (while the military tenures subsisted), the next presentation to a church, estates by a statute-merchant, statute-staple, *elegit,* or the like.[2] And these are called real chattels, as

1. See 1 Bouvier Law Dict. Chattels; Co. Litt., 118.

2. See 1 Bouvier Law Dict. A box with the title deeds of land is said to

being interests issuing out of or annexed to real estates, of which they have one quality, viz., immobility, which denominates them *real,* but want the other, viz., a sufficient legal, indeterminate duration, and this want it is that constitutes them *chattels.* The utmost period for which they can last is fixed and determinate, either for such a space of time certain, or till such a particular sum of money be raised out of such a particular income, so that they are not equal in the eye of the law to the lowest estate of freehold, a lease for another's life; their tenants were considered, upon feodal principles, as merely bailiffs or farmers, and the tenant of the freehold might at any time have destroyed their interest till the reign of Henry VIII.

2. **Chattels personal are, properly and strictly speaking, things movable,** which may be annexed to or attendant on the person of the owner, and carried about with him from one part of the world to another. [387] Such are animals, household stuff, money, jewels, corn, garments, and everything else that can properly be put in motion and transferred from place to place.[3]

be a chattel real in England. See 1 Bouvier Law Dict. Chattels; Co. Litt., 118; 2 Kent Com. 278; Ewell on Fixtures (2d Ed.), *230.

3. The real criterion as to whether any article is a chattel or not is whether on the death of the owner it passes to his administrator or executor; if so, it is a chattel interest.

CHAPTER XXV.

OF PROPERTY IN THINGS PERSONAL.

Property in chattels personal may be either in possession, which is where a man hath not only the right to enjoy, but hath the actual enjoyment of the thing, **or else it is in action,** where a man hath only a bare right without any occupation or enjoyment. [389] And of these the former, or property in *possession,* is divided into two sorts: an *absolute* and a *qualified* property.

I. **Property in possession absolute** is where a man hath solely and exclusively the right and also the occupation of any movable chattels, so that they cannot be transferred from him, or cease to be his, without his own act or default. Such may be all *inanimate* things, as goods, plate, money, jewels, implements of war, garments, and the like; such also may be all *vegetable* productions, as the fruit or other parts of a plant when severed from the body of it, or the whole plant itself when severed from the ground.

Animals are distinguished into such as are *domitae* and such as are *ferae naturae:* some being of a *tame,* and others of a *wild* disposition. [390] **In such as are of a nature tame and domestic** (as horses, kine, sheep, poultry, and the like), **a man may have as absolute a property as in any inanimate beings.** The stealing or forcible abduction of such property as this is also felony, for these are things of intrinsic value, serving for the food of man, or else for the uses of husbandry. **But in animals ferae naturae a man can have no absolute property.**[1]

Of all tame and domestic animals, **the brood belongs to the owner of the dam** or mother, the English law agreeing with the civil, that "*partus sequitur ventrem*"[2] in the brute creation, though for the most part in the human species it disallows that maxim. And therefore in the laws of England as well as Rome, "*si equam meam equus tuus praegnantem fecerit, non est tuum sed meum quod natum est.*"[3] And for

1. See *post,* p. *391, note.
2. The offspring follows the dam.
3. If my mare becomes with foal by your horse, the offspring is not yours

this Puffendorf gives a sensible reason, not only because the male is frequently unknown, but also because the dam, during the time of her pregnancy, is almost useless to the proprietor, and must be maintained with great expense and care; wherefore as her owner is the loser by her pregnancy, he ought to be the gainer by her brood. An exception to this rule is in the case of young cygnets, which belong equally to the owner of the cock and hen, and shall be divided between them. But here the reasons of the general rule cease, and *"cessante ratione cessat et ipsa lex;"*[4] for the male is well known by his constant association with the female; and for the same reason the owner of the one doth not suffer more disadvantage during the time of pregnancy and nurture than the owner of the other. [391]

II. **Other animals that are not of a tame and domestic nature** are either not the objects of property at all, or else fall under our other division, namely, that of *qualified, limited,* or *special* property, which is such as is not in its nature permanent, but may sometimes subsist and at other times not subsist. In discussing which subject I shall in the first place show how this species of property may subsist in such animals as are *ferae naturae,* or of a wild nature, and then how it may subsist in any other things when under particular circumstances.

First, then, a man may be invested with a qualified, but not an absolute property in all creatures that are ferae naturae, either *per industriam, propter impotentiam,* or *propter privilegium.*[5]

1. **A qualified property may subsist in animals ferae naturae per industriam hominis** by a man's *reclaiming* and making them tame by art, industry, and education, or by so confining them within his own immedite power that they cannot escape and use their natural liberty.[6] Our law ap-

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but mine. But it is otherwise in the case of a bailment for hire; for during the period of hiring the hirer shall have the increase. Conklin v. Havens, 12 John. 314.

4. The reason ceasing, the law itself ceases.

5. By industry, by weakness or by privilege.

6. See, generally, Ewell on Fixtures (2d Ed., 1905), *241 and notes, where the cases are fully collected.

prehends the most obvious distinction to be between such animals as we generally see tame, and are therefore seldom, if ever, found wandering at large, which it calls *domitae naturae,* and such creatures as are usually found at liberty, which are therefore supposed to be more emphatically *ferae naturae,* though it may happen that the latter shall be sometimes tamed and confined by the art and industry of man. [392] Such as are deer in a park, hares or rabbits in an enclosed warren, doves in a dove-house, pheasants or partridges in a mew, hawks that are fed and commanded by their owner, and fish in a private pond or in trunks. These are no longer the property of a man than while they continue in his keeping or actual possession; but if at any time they regain their natural liberty, his property instantly ceases,[7] unless they have *animum revertendi,*[8] which is only to be known by their usual custom of returning. The law therefore extends this possession farther than the mere manual occupation, for my tame hawk that is pursuing his quarry in my presence, though he is at liberty to go where he pleases, is nevertheless my property, for he hath *animum revertendi.* So are my pigeons that are flying at a distance from their home (especially of the carrier kind), and likewise the deer that is chased out of my park or forest, and is instantly pursued by the keeper or forester; all of which remain still in my possession, and I still preserve my qualified property in them. But if they stray without my knowledge, and do not return in the usual manner, it is then lawful for any stranger to take them. But if a deer, or any wild animal reclaimed, hath a collar or other mark put upon him, and goes and returns at his pleasure, or if a wild swan is taken and marked and turned loose in the river, the owner's property in him still continues, and it is not lawful for any one else to take him; but otherwise if the deer has been long absent without returning, or the swan leaves the neighborhood. Bees also are *ferae naturae;* but when hived and reclaimed a man may have a qualified property in them by the law of nature as well as by the civil law. And to the same purpose, not to say in

7. Cooley on Torts (Students' Ed., 1907), 413 and notes.

8. The disposition to return.

the same words, with the civil law, speaks Bracton. Occupation, that is, hiving or including them, gives the property in bees; for though a swarm lights upon my tree, I have no more property in them till I have hived them than I have in the birds which make their nests thereon, and therefore if another hives them he shall be their proprietor.[9] But a swarm which fly from and out of my hive are mine so long as I can keep them in sight, and have power to pursue them; and in these circumstances no one else is entitled to take them.[1] [393] But it hath been also said that with us the only ownership in bees is *ratione soli;* and the charter of the forest which allows every freeman to be entitled to the honey found within his own woods, affords great countenance to this doctrine, that a qualified property may be had in bees, in consideration of the property of the soil whereon they are found.

In all these creatures reclaimed from the wildness of their nature, the property is not absolute, but defeasible, a property that may be destroyed if they resume their ancient wildness and are found at large. For if the pheasants escape from the mew, or the fishes from the trunk, and are seen wandering at large in their proper element, they become *ferae naturae* again, and are free and open to the first occupant that hath ability to seize them. But while they thus continue my qualified or defeasible property, they are as much under the protection of the law as if they were absolutely and indefeasibly mine, and an action will lie against any man that detains them from me or unlawfully destroys them. It is also as much felony by common law to steal such of them as are fit for food as it is to steal tame animals;[2] but not so if they are only kept for pleasure, curiosity, or whim, as dogs, bears, cats, apes, parrots, and singing-birds, because their value is not intrinsic, but depending only on the caprice of the owner, though it is such an invasion of property as may amount to a civil injury, and be redressed

9. The right to cut the tree is in the owner of the soil and therefore such property as wild bees are susceptible of is in him also. Cooley on Torts (Students' Ed.), 413 and note; Fisher v. Steward, 1 Smith (N. H.), 60, 61.

1. Cooley on Torts, 414.

2. See Criminal Law, *post.*

by a civil action. [394] Yet to steal a reclaimed hawk is felony both by common law and statute, which seems to be a relic of the tyranny of our ancient sportsmen. And among our elder ancestors, the ancient Britons, another species of reclaimed animals, viz., cats, were looked upon as creatures of intrinsic value, and the killing or stealing one was a grievous crime, and subjected the offender to a fine, especially if it belonged to the king's household, and was the *custos horrei regii,* for which there was a very peculiar forfeiture.

2. **A qualified property may also subsist with relation to animals feræ naturæ, ratione impotentiæ,** on account of their own inability.[3] As when hawks, herons, or other birds build in my trees, or coneys or other creatures make their nests or burrows in my land, and have young ones there, I have a qualified property in those young ones till such time as they can fly or run away, and then my property expires; but till then it is in some cases trespass, and in others felony, for a stranger to take them away. For here, as the owner of the land has it in his power to do what he pleases with them, the law therefore vests a property in him of the young ones, in the same manner as it does of the old ones if reclaimed and confined, for these cannot through weakness, any more than the others through restraint, use their natural liberty and forsake him.

3. **A man may, lastly, have a qualified property in animals feræ naturæ, propter privilegium,** that is, he may have the privilege of hunting, taking, and killing them in exclusion of other persons.[4] [395] Here he has a transient property in these animals, usually called game, so long as they continue within his liberty, and may restrain any stranger from taking them therein; but the instant they depart into another liberty this qualified property ceases.[5]

3. See, generally, Ewell on Fixtures (2d Ed.), *241 and notes.

4. See Ewell on Fixtures (2d Ed.), *241.

5. "As regards beasts of the chase, the English rule is that if the hunter shoots and captures a beast on the land of another, the property in him is in the owner of the land. Under the civil law the property passed to the captor and such is believed to be the recognized rule in America even when the capture has been effected by means of a trespass on another's

The manner in which this privilege is acquired will be shown in a subsequent chapter.

The qualified property which we have hitherto considered extends only to animals *ferae naturae* when either reclaimed, impotent, or privileged. **Many other things may also be the objects of qualified property. It may subsist in the very elements of fire or light, of air and of water.** A man can have no absolute permanent property in these, as he may in the earth and land, since these are of a vague and fugitive nature, and therefore can admit only of a precarious and qualified ownership, which lasts so long as they are in actual use and occupation, but no longer. If a man disturbs another and deprives him of the lawful enjoyment of these, if one obstructs another's ancient windows,[6] corrupts the air of his house or gardens, fouls his water, or unpens and lets it out, or if he diverts an ancient watercourse that used to run to the other's mill or meadow, the law will animadvert hereon as an injury, and protect the party injured in his possession. But the property in them ceases the instant they are out of possession, for when no man is engaged in their actual occupation they become again common, and every man has an equal right to appropriate them to his own use.

Property may also be of a qualified or special nature, on account of the peculiar circumstances of the owner, when the thing itself is very capable of absolute ownership [396]; as in case of **bailment,**[7] or delivery of goods to another person for a particular use, as to a carrier to convey to London, to an innkeeper to secure in his inn, or the like. Here there is no absolute property in either the bailor or the bailee, the person delivering or him to whom it is delivered; for the bailor hath only the right and not the immediate possession, the bailee hath the possession and only a temporary right. But it is a qualified property in them both, and each of them is entitled to an action in case the goods

land." Cooley on Torts (Students' Ed.), 414 and cases cited. See, also, Ewell on Fixtures (2d Ed.), *241, 242 and notes.

6. This doctrine is not deemed applicable to this country. Parker v. Foote, 19 Wend. 309.

7. See *post*, *451.

be damaged or taken away: the bailee on account of his immediate possession, the bailor because the possession of the bailee is, immediately, his possession also. So also in case of goods pledged or pawned upon condition either to repay money or otherwise: both the pledger and pledgee have a qualified, but neither of them an absolute, property in them. The pledger's property is conditional, and depends upon the performance of the condition of repayment, &c., and so too is that of the pledgee, which depends upon its non-performance. The same may be said of goods distreined for rent or other cause of distress, which are in the nature of a pledge, and are not at the first taking the absolute property of either the distreinor or party distreined upon, but may be redeemed, or else forfeited by the subsequent conduct of the latter. But a servant who hath the care of his master's goods or chattels, as a butler of plate, a shepherd of sheep, and the like, hath not any property or possession, either absolute or qualified, but only a mere charge or oversight.[8]

We will proceed next to take a short view of **the nature of property in action**, or such where a man hath not the occupation, but merely a bare right to occupy the thing in question, the possession whereof may, however, be recovered by a suit or action at law, from whence the thing so recoverable is called a thing, or **chose in action.** [397] Thus money due on a bond is a *chose* in action, for a property in the debt vests at the time of forfeiture mentioned in the obligation, but there is no possession till recovered by course of law. If a man promises or covenants with me to do any act, and fails in it, whereby I suffer damage, the recompense for this damage is a *chose* in action; for though a right to some recompense vests in me at the time of dam-

8. The common law actions of trover, replevin and trespass are possessory in their nature, i. e., founded upon a right of possession. The bailor, not being in possession, may maintain case for an injury to his interest in the nature of a reversion. As to possessory actions in general, see the leading case of Armory v. Delamire, 1 Strange, 504; 1 Smith's Lead. Cases, *470 *et seq.*, and cases collected in the notes. The subject will be further considered under the head of Pleading, *post*, in this volume and also in volume 2 of this series.

age done, yet what and how large such recompense shall be can only be ascertained by verdict, and the possession can only be given me by legal judgment and execution. In the former of these cases the student will observe that the property or right of action depends upon an *express* contract or obligation to pay a stated sum, and in the latter it depends upon an *implied* contract that if the covenantor does not perform the act he engaged to do, he shall pay me the damages I sustain by this breach of covenant. And hence it may be collected that **all property in action depends entirely upon contracts, either express or implied, which are the only regular means of acquiring a chose in action.**

And having thus distinguished the different *degree* or *quantity* of *dominion* or *property* to which things personal are subject, we may add a word or two concerning the *time* of their *enjoyment* and the *number* of their *owners*.

First, **as to the time of enjoyment.** [398] By the rules of the ancient common law there could be no future property to take place in expectancy, created in personal goods and chattels. But yet[9] in last wills and testaments such limitations of personal goods and chattels, in remainder after a bequest for life, were permitted. And therefore if a man either by deed or will limits his books or furniture to A for life, with remainder over to B, this remainder is good. But where an estate-tail in things personal is given

9. *Choses in action* are either *ex contractu* or *ex delicto*, i. e., arising out of torts or wrongs, though the term is sometimes used in the narrower sense of the text. By the common law *choses in action* were not assignable, using the term in the common law sense of a transfer such as enables the assignee to sue in his own name. But latterly the assignee could sue in the name of the assignor for the use of the assignee even at law; and now by statute he may sue in many states in his own name. As to torts the distinction is taken that a tort which relates to property and benefits the estate of the wrongdoer is assignable, but not mere personal torts as for slander or assault and battery.

Prior to the statute 3 & 4 Wm. 4, c. 42, sec. 2, the remedy for a tort to the property of another, real or personal, by an action in form *ex delicto*, such as trespass, trover or case for waste, etc., could not have been enforced against the personal representations of the tortfeasor; and even now no action can be maintained against them for a personal tort committed by him. See Broom's Legal Maxims, *811, 820. (*Actio personalis moritur cum persona*), a personal action dies with the person.

to the first or any subsequent possessor, it vests in him the total property, and no remainder over shall be permitted on such a limitation.[1]

Next, **as to the number of owners.** [399] Things personal may belong to their owners, not only in severalty, but also in joint-tenancy, and in common as well as real estates. They cannot indeed be vested in coparcenary, because they do not descend from the ancestor to the heir, which is necessary to constitute coparceners. But if a horse or other personal chattel be given to two or more absolutely, they are joint-tenants hereof, and unless the jointure be severed, the same doctrine of survivorship shall take place as in estates of lands and tenements.[2] And in like manner if the jointure be severed, as by either of them selling his share, the vendee and the remaining part-owner shall be tenants in common, without any *jus accrescendi* or survivorship. So also if 100*l.* be given by will to two or more, *equally to be divided* between them, this makes them tenants in common, as the same words would have done in regard to real estates. But, for the encouragement of husbandry and trade, it is held that a stock on a farm, though occupied jointly, and also a stock used in a joint undertaking by way of partnership in trade, shall always be considered as common, and not as joint property, and there shall be no survivorship therein.

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1. At this day chattels real and personal cannot be directly *entailed*, but they may by deed of trust be as effectually settled to one *for life* with *remainders over*, as an estate of inheritance; if it be not attempted to render them unalienable beyond the period allowed by law. See Gilb. Uses and Trusts, by Sugden, 121, note 4, and Mr. Hargrave's note 5 to Co. Litt. 20a. See, also, Gillespie v. Miller, 5 John. Ch. 21; Underhill v. Tripp, 24 How. Pr. 51.

2. When legacies are given to two of more persons *in undivided shares*, as 100*l.* "to A. and B." or to the children of C.; or in case of a bequest to two without words of severance, the legatees will, at common law, take as *joint-tenants*. 2 P. Wms. 347, 529, 4 Bro. C. C. 15, 3 Ves. J. 628, 632, 6 Ves. J. 130.

When the legacies are given in *divided shares*, as so much of a sum of money to B. and so much to C., the legatees will be considered as *tenants in common;* as in instances where legacies are given to two or more persons, "share and share alike," or "to and among them," or "to them respectively," or "to be equally divided amongst them," such words will create a tenancy in common. 3 Atk. 731, 2 Atk. 441, 2 Atk. 121, 1 Atk. 494, 3 Bro. C. C. 25, 5 Ves. J. 510. See *ante*, *179 *et seq.* and notes.

CHAPTER XXVI.

OF TITLE TO THINGS PERSONAL BY OCCUPANCY.

We are next to consider the title to things personal, or the various means of *acquiring* and of *losing* such property as may be had therein. [400] And these methods of acquisition or loss are principally twelve: 1. By occupancy. 2. By prerogative. 3. By forfeiture. 4. By custom. 5. By succession. 6. By marriage. 7. By judgment. 8. By gift or grant. 9. By contract. 10. By bankruptcy. 11. By testament. 12. By administration.

I. And first, **a property in goods and chattels may be acquired by occupancy.**

1. **Thus, in the first place, it hath been said that anybody may seize to his own use such goods as belong to an alien enemy.** [401]. But this, however generally laid down by some of our writers, must in reason and justice be *restrained to such captors as are authorized by the public authority or the state*, residing in the crown, and to such goods as are brought into this country by an alien enemy, after a declaration of war, without a safe-conduct or passport. And therefore it hath been holden that where a foreigner is resident in England, and afterwards a war breaks out between his country and ours, his goods are not liable to be seized. It hath also been adjudged that if an enemy take the goods of an Englishman, which are afterwards retaken by another subject of this kingdom, the former owner shall lose his property therein, and it shall be indefeasibly vested in the second taker, unless they were retaken the same day, and the owner before sunset puts in his claim of property,— which is agreeable to the law of nations as understood in the time of Grotius, even with regard to captures made at sea, which were held to be the property of the captors after a possession of twenty-four hours, though the modern authorities require that before the property can be changed, the goods must have been brought into port, and have continued a night *intra presidia*,

in a place of safe custody, so that all hope of recovering them was lost.[1] [402]

And as in the goods of an enemy, so also in his *person*, a man may acquire a sort of qualified property by taking him a prisoner in war; at least till his ransom be paid.

2. Thus again, **whatever movables are found upon the surface of the earth or in the sea, and are unclaimed by any owner,** are supposed to be abandoned by the last proprietor, and, as such, are returned into the common stock and mass of things, and therefore they belong, as in a state of nature, to the first occupant or fortunate finder, unless they fall within the description of waifs, or estrays, or wreck, or hidden treasure; for these, we have formerly seen, are vested by law in the king, and form a part of the ordinary revenue of the crown.

3. Thus, too, **the benefit of the elements, the light, the air, and the water,** can only be appropriated by occupancy. If I have an ancient window overlooking my neighbor's ground, he may not erect and blind to obstruct the light,[2] but if I build my house close to his wall, which darkens it, I cannot compel him to demolish his wall, for there the first occupancy is rather in him than in me. If my neighbor makes a tanyard so as to annoy and render less salubrious the air of my house or gardens, the law will furnish me with a remedy; but if he is first in possession of the air,

1. Sentence of condemnation by a court of competent jurisdiction, a prize court, is necessary. Questions respecting the seizure of property as prizes, seldom arise in the common law or equity courts, they being, in general, cognizable only in the admiralty courts (United States Courts); and when a ship is *bona fide* seized as prize, the owner cannot sustain an action in a court of common law for the seizure, though she be released without any suit being instituted against her, his remedy, if any, being in the court of admiralty, 2 Marsh. R. 133; and the same rule applies to the imprisonment of the person when it has taken place merely as a consequence of taking a ship as prize, although the ship has been acquitted. 1 Le Caux v. Eden, Dougl. 594. For the law respecting seizures and captures, and the modes of acquiring and losing property thereby, see the admiralty decisions of Sir Wm. Scott, collected and arranged in 1 Chitty's Commercial L. 377 to 512, and 2 Wooddes. 435 to 457.

2. The English law as to ancient lights has been held inapplicable to this country in some of the states and followed in others. See Washburn on Easements, *498 *et seq.*

and I fix my habitation near him, the nuisance is of my own seeking, and may continue.[3] [403] If a stream be unoccupied I may erect a mill thereon and detain the water; yet not so as to injure my neighbor's prior mill or his meadow, for he hath by the first occupancy acquired a property in the current.

4. With regard likewise to **animals feræ naturæ,**[4] all mankind had, by the original grant of the Creator, a right to pursue and take any fowl or insect of the air, any fish or inhabitants of the waters, and any beast or reptile of the field; and this natural right still continues in every individual, unless where it is restrained by the civil laws of the country. **And when a man has once so seised them they become, while living, his qualified property, or if dead are absolutely his own;** so that to steal them or otherwise invade this property is, according to their respective value, sometimes a criminal offence, sometimes only a civil injury. The restrictions which are laid upon this right by the laws of England relate principally to royal fish, as whale and sturgeon, and such terrestrial, aerial, or aquatic animals as go under the denomination of **game,**[5] the taking of which is made the exclusive right of the prince and such of his subjects to whom he has granted the same royal privilege. But those animals which are not expressly so reserved are still liable to be taken and appropriated by any of the king's subjects, upon their own territories, in the same manner as they might have taken even game itself till these civil prohibitions were issued.

5. To this principle of occupancy also must be referred the method of acquiring a special personal property in corn growing on the ground or other **emblements,**[6] by any *possessor* of the land who hath sown or planted it, whether he be owner of the inheritance or of a less estate, which emblements are distinct from the real estate in the land, and subject to many, though not all, the incidents attending

3. *Contra*, Susquehanna Fertilizer Co. v. Malone, 73 Md. 268; Hale v. Barlow, 4 C. B. (N. S.) 336; Cooley on Torts (Students' Ed.), 573, 574.

4. See *ante*, *390.

5. See *ante*.

6. See *ante*, p. *122, 144.

personal chattels. [404] They were devisable by testaments before the statute of wills, and at the death of the owner shall vest in his executor and not his heir; they are forfeitable by outlawry in a personal action, and by the statute 11 Geo. II. c. 19, though not by the common law, they may be destreined for rent-arrere.

6. The doctrine of **property arising from accession** is also grounded on the right of occupancy. By the Roman law, if any given corporeal substance received afterwards an accession by natural or by artificial means, as by the growth of vegetables, the pregnancy of animals, the embroidering of cloth, or the conversion of wood or metal into vessels and utensils, the original owner of the thing was entitled by his right of possession to the property of it under such its state of improvement; but if the thing itself by such operation was changed into a different species, as by making wine, oil, or bread out of another's grapes, olives, or wheat, it belonged to the new operator, who was only to make a satisfaction to the former proprietor for the materials which he had so converted. And these doctrines are implicitly copied and adopted by our Bracton, and have since been confirmed by many resolutions of the courts.[7] [405] It hath even been held that if one

7. This also has long been the law of England; for it is laid down in the Year-books, that whatever alteration of form any property has undergone, the owner may seize it in its new shape, if he can prove the identity of the original materials; as if leather be made into shoes, cloth into a coat, or if a tree be squared into timber, or silver melted or beat into a different figure. 5 Hen. VII. fo. 15, 12 Hen. VIII. fo. 10. The cases referred to, Bro. Ab. Propertie, 23 Moor. 20, Poph. 38, are very explicit; see, also, 2 Campb 576, Com. Dig. Pleader, 3 M. 28, Bac. Ab. Tresp. E. 2.

Judge Cooley in his work on Torts uses the following language: "In general the owner of property, so long as he can trace and identify his own, may reclaim it. If one has willfully as a trespasser taken the property of another and altered it in form or substance by an expenditure of his own labor or money, he will not be suffered to acquire a title by his wrongful action as against the original owner reclaiming his property. Therefore, one whose trees have been converted into shingles by a trespasser may reclaim his property in shingles. . . . Indeed the doctrine has been carried so far that in New York it has been held that one whose grain has been taken by a willful trespasser and converted into alcoholic liquors is entitled to demand and recover the new product." Cooley on Torts (Stu-

takes away and clothes another's wife or son, and afterwards they return home, the garments shall cease to be his property who provided them, being annexed to the person of the child or woman.

7. But in the case of **confusion of goods**, where those of two persons are so intermixed that the several portions can be no longer distinguished, the English law partly agrees with and partly differs from the civil. If the intermixture be by consent, I apprehend that in both laws the proprietors have an interest in common in proportion to their respective shares. But if one wilfully intermixes his money, corn, or hay with that of another man without his approbation or knowledge, or casts gold in like manner into another's melting-pot or crucible, the civil law, though it gives the sole property of the whole to him who has not interfered in the mixture, yet allows a satisfaction to the other for what he has so improvidently lost. But our law, to guard against fraud, gives the entire property, without any account, to him whose original dominion is invaded and endeavored to be rendered uncertain without his own consent.[8]

8. There is still another species of property, which (if it subsists by the common law), being grounded on labor and invention, is more properly reducible to the head of occupancy than any other. And this is **the right which an author may be supposed to have in his own original literary composition**, so that no other person without his leave may publish or make profit of the copies. When a man by the exertion of his rational powers has produced an original work, he seems to have clearly a right to dispose of that

dents' Ed.), 117, 118; Church v. Lee, 5 John. 348; Burris v. Johnson, 1 J. J. Marsh, 196 Silsbury v. McCoon, 3 N. Y. 379.

Some cases hold that in trover for the value where the trespass is by mistake and innocent, the owner is only entitled to recover the value of the property as part of the realty or immediately after severance and not its value in its improved state as where the trespass is willful. See Cooley on Torts (Students' Ed.), 118 and cases cited.

8. But if the goods are practically of the same kind and quality, the injured party is only entitled to take his proportion from the common mass. It is only where the mixture is wrongful and the separation of the goods is practically impossible, that the law permits the injured party to take the whole. Cooley on Torts (Students' Ed.), 115 and cases cited.

identical work as he pleases; and any attempt to vary the disposition he has made of it appears to be an invasion of that right. [406] Now the identity of a literary composition consists entirely in the *sentiment* and the *language;* the same conceptions, clothed in the same words, must necessarily be the same composition. And whatever method be taken of exhibiting that composition to the ear or the eye of another, by recital, by writing, or by printing, in any number of copies or at any period of time, it is always the identical work of the author which is so exhibited, and no other man (it hath been thought) can have a right to exhibit it, especially for profit, without the author's consent. This consent may perhaps be tacitly given to all mankind when an author suffers his work to be published by another hand without any claim or reserve of right, and without stamping on it any marks of ownership, it being then a present to the public, like building a church or bridge, or laying out a new highway; but in case the author sells a single book, or totally grants the copyright, it hath been supposed, in the one case, that the buyer hath no more right to multiply copies of that book for sale than he hath to imitate for the like purpose the ticket which is bought for admission to an opera or a concert, and that, in the other, the whole property, with all its exclusive rights, is perpetually transferred to the grantee. On the other hand, it is urged that, though the exclusive property of the manuscript and all which it contains undoubtedly belongs to the author *before* it is printed or published, yet, from the instant of publication, the exclusive right of an author or his assigns to the sole communication of his ideas immediately vanishes and evaporates, as being a right of too subtle and unsubstantial a nature to become the subject of property at the common law, and only capable of being guarded by positive statutes and special provisions of the magistrate.

The Roman law adjudged that if one man wrote anything on the paper or parchment of another, the writing should belong to the owner of the blank materials, meaning thereby the mechanical operation of writing, for which it directed the scribe to receive a satisfaction; for in works of

genius and invention, as in painting on another man's canvas, the same law gave the canvas to the painter.[9] [407]

But whatever inherent copyright might have been supposed to subsist by the common law, the statute 8 Anne, c. 19 (amended by statute 15 Geo. III. c. 53), hath now declared that the author and his assigns shall have the sole liberty of printing and reprinting his works for the term of fourteen years, *and no longer,* and hath also protected that property by additional penalties and forfeitures; directing further, that if at the end of that term the author himself be living, the right shall then return to him for another term of the same duration,[1] and a similar privilege is extended to the inventors of prints and engravings, for the term of eight-and-twenty years, by the statutes 8 Geo. II, c. 13, and 7 Geo. III. c. 38, besides an action for damages, with double costs, by statute 17 Geo. III. c. 57. All which parliamentary protections appear to have been suggested by the exception in the statute of monopolies, 21 Jac. I. c. 3, which allows a royal *patent* of privilege to be granted for fourteen years to any inventor of a new manufacture, for the sole working or making of the same; by virtue whereof it is held, that a temporary property therein becomes vested in the king's patentee.[2]

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9. "In the case of Miller v. Taylor, 4 Burr. 2303, it was held that an exclusive and permanent copyright in authors subsisted by the common law. But afterwards, in the case of Donaldson v. Becket, 4 Burr. 2408, before the House of Lords, it was held that no copyright subsists in authors after the expiration of the several terms created by the statute of Queen Anne." See Drone on Copyright, 1; Wheaton v. Peters, 8 Pet. 591; Rev. Stat. U. S., §§ 4948-4972; 5 & 6 Vict., ch. 45; 45 & 46 Vict., ch. 40.

The author of any literary, dramatic or musical composition or work of art has, however, at common law a property in his production which the law will protect so long as he has not made such a publication of it as constitutes an abandonment of his rights; and a restricted publication is not such an abandonment. A publication to constitute an abandonment must be literally one which puts the production before the general public. See, generally, Cooley on Torts (Students' Ed.), 353 and cases cited.

1. See note (9), *supra.*

2. As to United States patents, see Act of Congress, 1909, which grant a monopoly to an inventor for 28 years upon compliance with the statutory requirements which are therein fully set forth. Patents, copyrights and trade-marks constitute a special branch of practice and have a voluminous literature. See Bender's Law Catalogue (1914), pages 79 and 80.

CHAPTER XXVII.

OF TITLE BY PREROGATIVE AND FORFEITURE.

II. **A second method of acquiring property in personal chattels is by the king's prerogative,** whereby a right may accrue either to the crown itself or to such as claim under the title of the crown, as by the king's grant or by prescription, which supposes an ancient grant. [408]

Such, in the first place, are all **tributes, taxes,**[1] **and customs,** whether constitutionally inherent in the crown, as flowers of the prerogative and branches of the *census regalis,* or ancient royal revenue, or whether they be occasionally created by authority of parliament. In these the king acquires and the subject loses a property the instant they become due. If paid, they are a *chose* in possession; if unpaid, a *chose* in action. Hither, also, may be referred all **forfeitures, fines, and amercements due to the king,** which accrue by virtue of his ancient prerogative or by particular modern statutes. And in either case the owner of the thing forfeited and the person fined or amerced lose and part with the property of the forfeiture, fine, or amercement the instant the king or his grantee acquires it.

In these several methods of acquiring property by prerogative there is also this peculiar quality, that **the king cannot have a joint property with any person in one entire chattel,** or such a one as is not capable of division or separation; but where the titles of the king and a subject concur, the king shall have the whole: in like manner as the king cannot, either by grant or contract, become a joint-tenant of a chattel real with another person, but by such grant or contract shall become entitled to the whole in severalty. [409] Thus, if a horse be given to the king and a private person, the king shall have the sole property; if a bond be made to the king and a subject, the king shall have the whole penalty, the debt or duty being one single chattel.

1. Taxation and special assessments also constitute another specialty and have a voluminous literature. See Bender's Law Catalogue, 104, 105.

And so if two persons have the property of a horse between them, or have a joint debt owing them on bond, and one of them assigns his part to the king or is attainted, whereby his moiety is forfeited to the crown, the king shall have the entire horse and entire debt.

[**As to the acquisition of property in wreck, in treasure-trove, in waifs, in estrays, in royal fish, in swans, and the like,** which are not *transferred* to the sovereign from any former owner, but are originally *inherent* in him by the rules of law, and are derived to particular subjects as royal franchises by his bounty, see the Eighth Chapter of the former Book.]

There is also a kind of **prerogative copyright subsisting in certain books**, which is held to be vested in the crown upon different reasons. [410] Thus, 1. The king, as the executive magistrate, has the right of promulgating to the people all **acts of state and government.** This gives him the exclusive privilege of printing at his own press, or that of his grantees, all *acts of parliament, proclamations,* and *orders of council.* 2. As supreme head of the church he hath a right to the publication of all **liturgies and books of divine service.** 3. He is also said to have a right by purchase to the copies of such **law-books, grammars,** and other compositions as were compiled or translated at the expense of the crown. And upon these two last principles combined the exclusive right of printing the translation of the **Bible** is founded.

There still remains another species of prerogative property, founded upon a very different principle from any that have been mentioned before: the property of such animals *ferae naturae* as are known by the denomination of **game,**[2] with the right of pursuing, taking, and destroying them, which is vested in the king alone, and from him derived to such of his subjects as have received the grants of a chase, a park, a free warren, or free fishery. By the law of nature every man, from the prince to the peasant, has an equal right of pursuing and taking to his own use all such crea-

2. The right to take game is variously regulated by statute in the several states. See the local statutes and also the statutes of the United States. See Ewell on Fixtures (2d Ed.), *241 notes; also *ante,* notes.

tures as are *ferae naturae*, and therefore the property of nobody, but liable to be seized by the first occupant. And so it was held by the imperial law even so late as Justinian's time. [411] But it follows from the very end and constitution of society that this natural right, as well as many others belonging to man as an individual, may be restrained by positive laws enacted for reasons of state, or for the supposed benefit of the community. This restriction may be either with respect to the *place* in which this right may or may not be exercised; with respect to the *animals* that are the subject of this right; or with respect to the *persons* allowed or forbidden to exercise it. And in consequence of this authority we find that the municipal laws of many nations have exerted such power of restraint: have in general forbidden the entering on another man's grounds for any cause without the owner's leave; have extended their protection to such particular animals as are usually the objects of pursuit; and have invested the prerogative of hunting and taking such animals in the sovereign of the state only, and such as he shall authorize.

Upon the Norman Conquest the right of pursuing and taking all beasts of chase or *venary*, and such other animals as were accounted *game*, was then held to belong to the king, or to such only as were authorized under him. [415] And this as well upon the principles of the feodal law, that the king is the ultimate proprietor of all the lands in the kingdom, they being all held to him as the chief lord, or lord paramount of the fee, and that therefore he has the right of the universal soil to enter thereon and to chase and take such creatures at his pleasure, as also upon another maxim of the common law, which we have frequently cited and illustrated, that these animals are *bona vacantia*, and, having no other owner, belong to the king by his prerogative. As, therefore, the former reason was held to vest in the king a *right* to pursue and take them anywhere, the latter was supposed to give the king and such as he should authorize a *sole* and *exclusive* right.

As the king reserved to himself the *forests* for his own exclusive diversion, so he granted out from time to time

other tracts of lands to his subjects under the names of *chases* or *parks,* or gave them license to make such in their own grounds, which indeed are smaller forests in the hands of a subject, but not governed by the forest laws; and by the common law no person is at liberty to take or kill any beasts of chase but such as hath an ancient chase or park, unless they be also beasts of prey. [416]

As to all inferior species of game, called beasts and fowls of warren, the liberty of taking or killing them is another franchise of royalty, derived likewise from the crown, and called *free warren,*—a word which signifies preservation or custody, as the exclusive liberty of taking and killing fish in a public stream or river is called a *free fishery;* of which, however, no new franchise can at present be granted by the express provision of *Magna Carta,* c. 16. [417] The principal intention of granting to any one these franchises or liberties was in order to protect the game, by giving the grantee a sole and exclusive power of killing it himself, provided he prevented other persons. And no man but he who has a chase or free warren, by grant from the crown or prescription, which supposes one, can justify hunting or sporting upon another man's soil; nor indeed, in thorough strictness of common law, either hunting or sporting at all. It is true that, by the acquiescence of the crown, the frequent grants of free warren in ancient times, and the introduction of new penalties of late by certain statutes for preserving the game, this exclusive prerogative of the king is little known or considered, every man that is exempted from these modern penalties looking upon himself as at liberty to do what he pleases with the game; whereas the contrary is strictly true, that no man, however well *qualified* he may vulgarly be esteemed, has a right to encroach on the royal prerogative by the killing of game, unless he can show a particular grant of free warren, or a prescription which presumes a grant, or some authority under an act of parliament. [418]

Upon the whole it appears that the king, by his prerogative, and such persons as have under his authority the royal franchises of chase, park, free warren, or free fishery, are the

only persons who may acquire any property, however fugitive and transitory, in these animals *ferae naturae* while living, which is said to be vested in them, as was observed in a former chapter, *propter privilegium.* [419] And it must also be remembered that such persons as may thus lawfully hunt, fish, or fowl *ratione privilegii,* have (as has been said) only a qualified property in these animals, it not being absolute or permanent, but lasting only so long as the creatures remain within the limits of such respective franchise or liberty, and ceasing the instant they voluntarily pass out of it. It is held, indeed, that if a man starts any game within his own grounds, and follows it into another's and kills it there, the property remains in himself. And this is grounded on reason and natural justice, for the property consists in the possession, which possession commences by the finding it in his own liberty, and is continued by the immediate pursuit. And so if a stranger starts game in one man's chase or free warren, and hunts it into another liberty, the property continues in the owner of the chase or warren, this property arising from privilege, and not being changed by the act of a mere stranger. Or if a man starts game on another's private grounds and kills it there, the property belongs to him in whose ground it was killed, because it was also started there, the property arising *ratione soli.* [Blades *v.* Higgs, 11 H. L. Cas. 621.] Whereas if, after being started there, it is killed in the grounds of a third person, the property belongs not to the owner of the first ground, because the property is local, nor yet to the owner of the second, because it was not started in his soil, but it vests in the person who started and killed it, though guilty of trespass against both the owners.

III. I proceed now to a third method whereby a title to goods and chattels may be acquired and lost, viz., by **forfeiture,** as a punishment for some crime or misdemeanor in the party forfeiting, and as a compensation for the offence and injury committed against him to whom they are forfeited.[3] [420]

3. See *post,* Book 4, Criminal Law.

In the variety of penal laws with which the subject is at present encumbered, it were a tedious and impracticable task to reckon up the various forfeitures inflicted by special statutes for particular crimes and misdemeanors. I shall therefore confine myself to those offences only by which *all* the goods and chattels of the offender are forfeited.

Goods and chattels, then, are totally forfeited by conviction of *high treason* or *misprision* of treason; of *petit treason;* of *felony* in general, and particularly of *felony de se*,[4] and of *manslaughter*,—nay, even by conviction of *excusable homicide;* by *outlawry* for treason of felony; by conviction of *petit larceny;* by *flight* in treason or felony, even though the party be acquitted of the fact; by *standing mute* when arraigned of *felony;* by *drawing a weapon on a judge*, or *striking* any one *in the presence of the king's courts;* by *praemunire;* by *pretended prophecies*, upon a second conviction; by *owling;* by the *residing abroad* of artificers, and by *challenging to fight* on account of money won at gaming. [421]

And this forfeiture commences from the time of conviction, not the time of committing the fact, as in forfeitures of real property.

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4. Suicide.

CHAPTER XXVIII.[1]

OF TITLE BY CUSTOM.

IV. **A fourth method of acquiring property in things personal or chattels is by custom,** whereby a right vests in some particular persons, either by the local usage of some particular place, or by the almost general and universal usage of the kingdom. [422] It were endless should I attempt to enumerate all the several kinds of special customs which may entitle a man to a chattel interest in different parts of the kingdom; I shall herefore content myself with making some observations on three sorts of customary interests which obtain pretty generally throughout most parts of the nation, and are therefore of more universal concern, viz. *heriots, mortuaries,* and *heirlooms.*

1. **Heriots** are usually divided into two sorts: heriot-*service* and heriot-*custom.* The former are such as are due upon a special reservation in a grant or lease of lands, and therefore amount to little more than a mere rent; the latter arise upon no special reservation whatsoever, but depend merely upon immemorial usage and custom. And they are defined to be a customary tribute of goods and chattels payable to the lord of the fee on the decease of the owner of the land.

This heriot is sometimes the best live beast or *averium* which the tenant dies possessed of, sometimes the best inanimate good, under which a jewel or piece of plate may be included; but it is always a *personal* chattel, which, immediately on the death of the tenant who was the owner of it, being ascertained by the option of the lord, becomes vested in him as his property, and is no charge upon the lands, but merely on the goods and chattels. [424] [Not applicable to this country.]

2. **Mortuaries** are a sort of ecclesiastical heriots, being a customary gift claimed by and due to the minister in very many parishes on the death of his parishioners. [425] After the lord's heriot or best good was taken out, the second best chattel was reserved to the church as a mortuary.

The variety of customs with regard to mortuaries giving frequently a handle to exactions on the one side and frauds or expensive litigations on the other, it was thought proper by statute 21 Hen. VIII. c. 6, to reduce them to some kind of certainty. [427] For this purpose it is enacted that all mortuaries or corse-presents to parsons of any parish shall be taken in the following manner, unless where by custom less or none at all is due: viz. for every person who does not leave goods to the value of ten marks, nothing; for every person who leave goods to the value of ten marks and under thirty pounds, 3*s.* 4*d.*; if above thirty pounds and under forty pounds, 6*s.* 8*d.*; if above forty pounds, of what value soever

1. Retained principally for its historical value.

they may be, 10*s.* and no more. And no mortuary shall throughout the kingdom be paid for the death of any feme-covert, nor for any child, nor for any one of full age that is not a housekeeper, nor for any wayfaring man, but such wayfaring man's mortuary shall be paid in the parish to which he belongs. And upon this statute stands the law of mortuaries to this day. [Not applicable to this country.]

3. **Heirlooms** are such goods and personal chattels as, contrary to the nature of chattels, shall go by special custom to the heir along with the inheritance, and not to the executor of the last proprietor. [Not applicable to this country.][2] The termination *loom* is of Saxon original, in which language it signifies a limb or member, so that an heirloom is nothing else but a limb or member of the inheritance. They are generally such things as cannot be taken away without damaging or dismembering the freehold; otherwise the general rule is that no chattel interest whatsoever shall go to the heir, notwithstanding it be expressly limited to a man and his heirs, but shall vest in the executor. But **deer** in a real authorized park, **fishes** in a pond, **doves** in a dove-house, etc., though in themselves personal chattels, yet they are so annexed to and so necessary to the well-being of the inheritance, that they shall **accompany the land** wherever it vests, by either descent or purchase.[3] [428] For this reason also I apprehend it is that the ancient jewels of the crown are held to be heirlooms, for they are necessary to maintain the state and support the dignity of the sovereign for the time being.

Charters likewise and deeds, court-rolls, and other evidences of the land, together with the chests in which they are contained, shall **pass together with the land to the heir,** in the nature of heirlooms, and shall not go to the executor.[4]

By special custom also in some places carriages, utensils, and other household implements may be heirlooms; but such custom must be strictly proved.

On the other hand, by almost general custom, **whatever is strongly affixed to the freehold or inheritance and cannot be severed from thence without violence or damage,**

2. See Ewell on Fixtures (2d Ed.), *232-239 and cases in notes.

3. See Ewell on Fixtures (2d Ed.), *241-245 and notes.

4. Ewell on Fixtures (2d Ed.), *229.

In this country where the statutes everywhere provide for the recording of deeds of conveyance in public offices, the grantor usually retains his own muniments of title; and a certified copy of the record of deeds being competent evidence, the rule of the text has lost much of its importance. See Ewell on Fixtures (2d Ed.), *228. Land warrants authorizing the location of public lands are real estate and pass to the heir unless specifically devised. Atwood v. Beck, 21 Ala. 590.

"*quod ab aedibus non facile revellitur*," is become a member of the inheritance, and shall thereupon pass to the heir, as chimney-pieces, pumps, old fixed or dormant tables, benches, and the like.[5]

Other personal chattels there are which also descend to the heir in the nature of heirlooms, as a **monument or tombstone** in a church, or the coat-armor of his ancestor there hung up, with the pennons and other ensigns of honor suited to his degree. [429] In this case, albeit the freehold of the church is in the parson, and these are annexed to that freehold, yet cannot the parson or any other take them away or deface them, but is liable to an action from the heir. Pews in the church are somewhat of the same nature, which may descend by custom immemorial, without any ecclesiastical concurrence, from the ancestor to the heir.[6]

But though the heir has a property in the monuments and escutcheons of his ancestors,[7] yet he has none in their bodies or ashes,[8] nor can he bring any civil action against such as indecently, at least, if not impiously, violate and disturb their remains when dead and buried. The parson, indeed, who has the freehold of the soil, may bring an action of trespass against such as dig and disturb it; and if any one in taking up a dead body steals the shroud or other apparel, it will be felony, for the property remains in the executor, or whoever was at the charge of the funeral.[9]

But to return to **heirlooms**; these, though they be mere chattels, yet **cannot be devised away from the heir by will**; but such a devise is void even by a tenant in fee-simple. For though the owner might during his life have sold or disposed of them, as he might of the timber of the estate, since as the inheritance was his own he might mangle or dismember it as he pleased, yet they being at his death instantly vested in the heir the devise—which is subsequent, and not to take effect till *after* his death—shall be postponed to the custom whereby they have already descended.

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5. See note on fixtures under head "Waste."

6. See the local statutes. Right of pewholder generally considered as a quasi-easement.

7. See Ewell on Fixtures (2d Ed.), *234.

8. There is no property in a corpse. Guthrie v. Weaver, 1 Mo. App. 136; Ewell on Fixtures (2d Ed.), *239.

9. See *post*, Criminal Law, Book 4. Consult the local statutes.

CHAPTER XXIX.

OF TITLE BY SUCCESSION, MARRIAGE, AND JUDGMENT.

V. **The fifth method of gaining a property in chattels, either personal or real, is by succession, which is, in strictness of law, only applicable to corporations aggregate**[1] of many, as dean and chapter, mayor and commonalty, master and fellows, and the like, in which one set of men may, by succeeding another set, acquire a property in all the goods, movables, and other chattels of the corporation. [430] The true reason whereof is because in judgment of law a corporation never dies, and therefore the predecessors who lived a century ago, and their successors now in being, are one and the same body corporate,— which identity is a property so inherent in the nature of a body politic, that even when it is meant to give anything to be taken in succession by such a body, that succession need not be expressed, but the law will of itself imply it. So that a gift to such a corporation, either of lands or of chattels, without naming their successors, vests an absolute property in them so long as the corporation subsists.

But with regard to sole corporations[2] a considerable distinction must be made. [431] For if such sole corporation be the representative of a number of persons,— as the master of an hospital, who is a corporation for the benefit of the poor brethren, an abbot, or prior, by the old law before the Reformation, who represented the whole convent,— such sole corporations as these have, in this respect, the same powers as corporations aggregate have to take personal property or chattels in succession. And therefore a bond to such a master, abbot, or dean, and his successors is good in law, and the successor shall have the advantage of it for the benefit of the aggregate society of which he is in law the representative. Whereas in the case of sole corporations, which represent no others but themselves, as

1. See *ante*, Corporations, notes. 2. See *ante*.

bishops, parsons, and the like, no chattel interest can regularly go in succession; and, therefore, if a lease for years be made to the Bishop of Oxford and his successors, in such case his executors or administrators, and not his successors, shall have it. For the word *successors,* when applied to a person in his political capacity, is equivalent to the word *heirs* in his natural, and as such a lease for years, if made to John and his heirs, would not vest in his heirs but his executors; so if it be made to John, Bishop of Oxford, and his successors, who are the heirs of his body politic, it shall still vest in his executors, and not in such his successors. The reason of this is obvious: for besides that the law looks upon goods and chattels as of too low and perishable a nature to be limited either to heirs or such successors as are equivalent to heirs, it would also follow that if any such chattel interest, granted to a sole corporation and his successors, were allowed to descend to such successor, the property thereof must be in abeyance from the death of the present owner until the successor be appointed; and this is contrary to the nature of a chattel interest, which can never be in abeyance or without an owner, but a man's right therein, when once suspended, is gone forever. [432] This is not the case in corporations aggregate, where the right is never in suspense, nor in the other sole corporations before mentioned, who are rather to be considered as heads of an aggregate body than subsisting merely in their own right. The chattel interest, therefore, in such a case is really and substantially vested in the hospital, convent, chapter, or other aggregate body, though the head is the visible person in whose name every act is carried on, and in whom every interest is therefore said, in point of form, to vest. **But the general rule with regard to corporations merely sole is this, that no chattel can go to or be acquired by them in right of succession.**

Yet to this rule there are **two exceptions.** One in the case of the **king,** in whom a chattel may vest by a grant of it formerly made to a preceding king and his successors. The other exception is where, **by a particular custom,** some *particular* corporations sole have acquired a power of tak-

ing *particular* chattel interests in succession. Wherefore, upon the whole, we may close this head with laying down this **general rule**: that such right of succession to chattels is universally inherent by the common law in all aggregate corporations, in the king, and in such single corporations as represent a number of persons, and may by special custom belong to certain other sole corporations for some particular purposes, although generally, in sole corporations, no such right can exist. [433]

VI. **A sixth method of acquiring property in goods and chattels is by marriage**, whereby those chattels which belonged formerly to the wife are by act of law vested in the husband, with the same degree of property and with the same powers as the wife when sole had over them.[3]

This depends entirely on the notion of an unity of person between the husband and wife, it being held that they are one person in law, so that the very being and existence of the woman is suspended during the coverture, or entirely merged or incorporated in that of the husband. And hence it follows that whatever **personal property** belonged to the wife before marriage, is by marriage absolutely vested in the husband. In a **real estate**, he only gains a title to the rents and profits during coverture, for that, depending upon feodal principles, remains entire to the wife after the death of her husband, or to her heirs if she dies before him, unless, by the birth of a child, he becomes tenant for life by the curtesy.[4] But in **chattel interests** the sole and absolute property vests in the husband, to be disposed of at his pleasure, if he chooses to take possession of them; for unless he reduces them to possession, by exercising some act of ownership upon them, no property vests in him, but they shall remain to the wife or to her representatives after the coverture is determined.

There is, therefore, a very considerable difference in the acquisition of this species of property by the husband ac-

3. The rules under this head have been extensively changed by statute in many of the states. See *ante*.

4. Considered *ante*.

cording to the subject-matter: viz. whether it be a chattel *real* or chattel *personal;* and, of chattels personal, whether it be in *possession* or in *action* only. [434] **A chattel real** vests in the husband, not absolutely, but *sub modo.* As, in case of a lease for years, the husband shall receive all the rents and profits of it, and may, if he pleases, sell, surrender, or dispose of it during the coverture;[5] if he be outlawed or attainted, it shall be forfeited to the king;[6] it is liable to execution for his debts; and, if he survives his wife, it is to all intents and purposes his own. Yet if he has made no disposition thereof in his lifetime, and dies before his wife, he cannot dispose of it by will; for the husband having made no alteration in the property during his life, it never was transferred from the wife, but after his death she shall remain in her ancient possession, and it shall not go to his executors. So it is also of **chattels personal (or choses) in action,** as debts upon bond, contracts, and the like: these the husband may have if he pleases; that is, if he reduces them into possession by receiving or recovering them at law. And upon such receipt or recovery they are absolutely and entirely his own, and shall go to his executors or administrators, or as he shall bequeath them by will, and shall not revest in the wife. But if he dies before he has recovered or reduced them into possession, so that at his death they still continue *choses in action,* they shall survive to the wife, for the husband never exerted the power he had of obtaining an exclusive property in them.[7] Thus in both these species of property the law is the same in case the wife survives the husband; but **in case the husband survives the wife,** the law is very different with respect to

5. Turner's Case, 1 Vern. 7; s. c., 1 Eq. Cas. Abr. 58; Ewell's Lead. Cases (1st Ed.), 475; Robertson v. Norris, 11 Ad. & Ell. N. S. 916; Ewell's Lead. Cases, 478-487 and notes. Consult the local statutes as the common law on this subject has been largely changed by statute.

6. Outlawry and attainder no longer exist in this country.

7. See Schuyler v. Hoyle, 5 John. Ch. 196; Hayward v. Hayward, 20 Pick. 517; Blount v. Bestland, 5 Ves. 515; Ewell's Lead. Cases, 357-386, 408, 457 and notes treating this subject at great length. The rules of the text are still the law in this country, except as changed by statutes. See *ante,* and notes.

chattels real and *choses in action:* for he shall have the *chattel real* by survivorship, but not the *chose in action,* except in the case of arrears for rent due to the wife before her coverture, which in case of her death are given to the husband by statute 32 Hen. VIII. c. 37. [435] And the reason for the general law is this, that the husband is in absolute possession of the *chattel real* during the coverture by a kind of joint-tenancy with his wife; wherefore the law will not wrest it out of his hands and give it to her representatives, though, in case he had died first, it would have survived to the wife, unless he thought proper in his lifetime to alter the possession. But a *chose in action* shall not survive to him, because he never was in possession of it at all during the coverture, and the only method he had to gain possession of it was by suing in his wife's right; but as, after her death, he cannot (as husband) bring an action in her right, because they are no longer one and the same person in law, therefore he can never (as such) recover the possession. **But he still will be entitled to be her administrator,** and may in that capacity recover such things in action as became due to her before or during the coverture.[8]

As to chattels personal (or choses) in possession which the wife hath in her own right, as ready money, jewels, household goods, and the like, the husband hath therein an immediate and absolute property, devolved to him by the marriage, not only potentially, but in fact, which never can again revest in the wife or her representatives.[9]

In one particular instance the wife may acquire a property in some of her husband's goods, which shall remain to her after his death and not go to his executors. These are called her **paraphernalia,** which is a term borrowed from the civil law, and is derived from the Greek language,

8. That in the absence of statutory provisions to the contrary, the husband is entitled to administer on the estate of his wife is well settled. Whitaker v. Whitaker, 6 John. 112; Ewell's Lead. Cases (1st Ed.), 513-521 and notes.

9. Whitaker v. Whitaker, 1 Den. 310; Buckley v. Collier, 1 Salk. 114 (wife's earnings); Skillman v. Skillman, 15 N. J. Eq. 478 (wife's earnings); Ewell's Lead. Cases, 343-356 and notes. This rule has been changed by statute in many states. Consult the local statutes. See *ante.*

signifying something over and above her dower. [436] Our law uses it to signify the apparel and ornaments of the wife suitable to her rank and degree; and therefore even the jewels of a peress usually worn by her have been held to be *paraphernalia*. These she becomes entitled to at the death of her husband, over and above her jointure or dower, and preferably to all other representatives. Neither can the husband devise by his will such ornaments and jewels of his wife, though during his life perhaps he hath the power (if unkindly inclined to exert it) to sell them or give them away. But if she continues in the use of them till his death, she shall afterwards retain them against his executors and administrators, and all other persons except creditors, where there is a deficiency of assets. And her necessary apparel is protected even against the claim of creditors.[1]

VII. **A judgment,** in consequence of some suit or action in a court of justice, is frequently the means of vesting the right and property of chattel interests in the prevailing party.[2] And here we must be careful to distinguish between property, the *right* of which is before vested in the party, and of which only *possession* is recovered by suit or action, and property to which a man before had no determinate title or certain claim, but he gains as well the right as the possession by the process and the judgment of the law. Of the former sort are all debts and *choses in action*. But there is also a species of property to which a man has not any claim or title whatsoever till after suit commenced and judgment obtained in a court of law; where the right and the remedy do not follow each other as in common cases, but accrue at one and the same time; and where, before judgment had, no man can say that he has any absolute property, either in possession or in action. [437] Of this nature are,

1. **Such penalties as are given by particular statutes,** to be recovered on an action *popular;* or, in other words, to be

1. Consult the local statutes.

2. A judgment is the conclusion of the law pronounced upon the facts admitted in the record by demurrer or other appropriate method, or found by verdict or its equivalent. See *post*, Book 3, *395.

recovered by him or them that will sue for the same. Such as the penalty of 500*l.*, which those persons are by several acts of parliament made liable to forfeit that, being in particular offices or situations in life, neglect to take the oaths to the government, — which penalty is given to him or them that will sue for the same. Now here it is clear that no particular person, A or B, has any right, claim, or demand, in or upon this penal sum till after action brought; for he that brings his action and can *bona fide* obtain judgment first, will undoubtedly secure a title to it in exclusion of everybody else. He obtains an inchoate imperfect degree of property by commencing his suit, but it is not consummated till judgment; for it any collusion appears he loses the priority he had gained. But, otherwise, the right so attaches in the first informer that the king (who before action brought may grant a pardon which shall be a bar to all the world) cannot, after suit commenced, remit anything but his own part of the penalty. For by commencing the suit the informer has made the popular action his own private action, and it is not in the power of the crown or of anything but parliament to release the informer's interest.[3]

2. Another species of property that is acquired and lost by suit and judgment at law is that of **damages**[4] given to a man by a jury as a compensation and satisfaction for

3. See, however, Butler v. Palmer, 1 Hill, 330; Parmelee v. Lawrence, 44 Ill. 415; Confiscation Cases, 7 Wall. 454.

4. Damages are of three kinds, nominal, compensatory and punitive. Every wrong imports a damage; and if none are proved, nominal damages are receivable. See the leading case of Ashby v. White, Lord Raymond, 938; 1 Smith's Lead. Cases, *342 and notes; Cooley on Torts (Students' Ed.), 124; 1 Sedg. Dam., § 98.

Compensatory damages are such as make good the actual loss sustained by the wrong complained of. Cooley on Torts (Students' Ed.), 126. This is the rule in all cases of contract, except actions for breach of promise of marriage, and in most actions for torts. Id., 126. Punitive, exemplary or vindictive damages are something given in addition to actual compensation for the purpose of punishment or example; and may be awarded when the wrong is committed maliciously or with an evil intent or is wanton, deliberate or oppressive. Id., 126. See, generally, Cooley on Torts (Students' Ed.), 123-129; Hale on Damages; Sedgwick on Damages and Sutherland on Damages.

some injury sustained, as for a battery, for imprisonment, for slander, or for trespass. [438] Here the plaintiff has no certain demand till after verdict; but when the jury has assessed his damages, and judgment is given thereupon, whether they amount to twenty pounds or twenty shillings, he instantly acquires, and the defendant loses at the same time, a right to that specific sum. It is true that this is not an acquisition so perfectly original as in the former instance, for here the injured party has unquestionably a vague and indeterminate right to some damages or other the instant he receives the injury; and the verdict of the jurors and judgment of the court thereupon do not in this case so properly vest a *new* title in him as fix and ascertain the *old* one; they do not *give*, but *define*, the right. But, however, though strictly speaking the primary right to a satisfaction for injuries is given by the law of nature, and the suit is only the means of ascertaining and recovering that satisfaction, yet, as the legal proceedings are the only visible means of this acquisition of property, we may fairly enough rank such damages or satisfaction assessed under the head of property acquired by suit and judgment at law.

3. Hitherto also may be referred, upon the same principle, all title to **costs and expenses of suit** which are often arbitrary, and rest entirely on the determination of the court upon weighing all circumstances, both as to the *quantum* and also (in the courts of equity especially, and upon motions in the courts of law) whether there shall be any costs at all. [439] These costs, therefore, when given by the court to either party, may be looked upon as an acquisition made by the judgment of law.[5]

5. With us costs are only allowed in actions at law where warranted by statute or perhaps by some general rule of court.

CHAPTER XXX.

OF TITLE BY GIFT, GRANT, AND CONTRACT.

VIII. **Gifts, or grants,** which are the eighth method of transferring personal property, are thus to be distinguished from each other, that *gifts* are always *gratuitous, grants* are upon some *consideration* or equivalent; and they may be divided, with regard to their subject-matter, into gifts or grants of chattels *real,* and gifts or grants of chattels *personal.* [440] Under the head of gifts or grants of chattels *real* may be included all leases for years of land, assignments, and surrenders of those leases, and all the other methods of conveying an estate less than freehold which were considered in the Twentieth Chapter of the present Book; though these very seldom carry the outward appearance of a gift, however freely bestowed, being usually expressed to be made in consideration of blood, or natural affection, or of five or ten shillings nominally paid to the grantor; and in case of leases, always reserving a rent, though it be but a peppercorn, — any of which considerations will in the eye of the law convert the gift, if executed, into a grant; if not executed, into a contract.

Grants or gifts of chattels personal are the act of transferring the right and the possession of them, whereby one man renounces and another man immediately acquires all title and interest therein, which may be done either in writing or by word of mouth, attested by sufficient evidence, of which the delivery of possession is the strongest and most essential. [441] But this conveyance, when merely **voluntary,** is somewhat suspicious, and is usually construed to be fraudulent if creditors or others become sufferers thereby. And by **statute 13 Eliz. c. 5,** every grant or gift of chattels, as well as lands, with an intent to defraud creditors or others, shall be void as against such persons to whom such fraud would be prejudicial, but as against the grantor himself shall stand good and effectual.[1]

1. See *ante,* note.

A true and proper gift or grant is always accompanied with delivery of possession, and takes effect immediately; as if A gives to B 100*l.* or a flock of sheep, and puts him in possession of them directly, it is then a gift executed in the donee, and it is not in the donor's power to retract it, though he did it without any consideration or recompense, unless it be prejudicial to creditors, or the donor were under any legal incapacity, as infancy, coverture, duress, or the like, or if he were drawn in, circumvented, or imposed upon by false pretenses, ebriety, or surprise. But if the gift does not take effect by delivery of immediate possession, it is then not properly a gift, but a contract;[2] and this a man cannot be compelled to perform but upon good and sufficient consideration, as we shall see under our next division. [442]

IX. **A contract, which usually conveys an interest merely in action, is thus defined: "An agreement upon sufficient consideration to do or not to do a particular thing."**[3] From

2. Tiffany on Sales (2d Ed.), 12 and cases cited; 2 Kent Com. 438.

Gifts are of two sorts, *inter vivos*, or between the living, and *causa mortis*, by reason of death. As stated in the text, there must be an actual delivery in the case of gifts *inter vivos* or the title does not pass. A mere intention or promise will not suffice. 2 Kent Com. *438. The delivery must be according to the nature of the thing. If it be not capable of actual delivery, there must be some act equivalent to it. There may be a constructive or symbolical delivery. 2 Kent Com. *439. A chose in action must be assigned. Id.; Priot v. Sanderson, 1 Dev. (N. C.) 309.

The gift when perfected by delivery and acceptance is irrevocable, unless in fraud of creditors. 2 Kent Com. 440.

Gifts *causa mortis* are conditional like legacies and must be made by the donor in his last illness or in the contemplation and expectation of death. If the donor recovers, the gift becomes void and he may revoke it any time before death. Delivery is necessary as in the case of gifts *inter vivos*. 2 Kent Com. *444-446 and cases cited.

3. This is the usual definition of a simple contract. Mr. Clark in his work on Contracts, defines a contract "in its broadest sense as an agreement whereby one or more of the parties acquire a right *in rem* or *in personam*, in relation to some person, thing, act or forbearance." Clark on Contracts (3d Ed.), 1. "A contract in its narrower and more proper sense is an executory contract. It is the result of the concurrence of agreement and obligation, and may be defined as an agreement enforcible at law, made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others." Id., 2.

which definition there arises three points to be contemplated in all contracts: 1. The *agreement;* 2. The *consideration;* and 3. The *thing* to be done or omitted, or the different species of contracts.

First, then, **it is an agreement,** a mutual bargain or convention; and therefore there must at least be two contracting parties of sufficient ability to make a contract: as where A contracts with B to pay him 100*l.*, and thereby transfers a property in such sum to B. Which property is however not in possession, but in action merely, and recoverable by suit at law; wherefore it could not be transferred to another person by the strict rules of the ancient common law, **for no chose in action could be assigned or granted over,** because it was thought to be a great encouragement to litigiousness if a man were allowed to make over to a stranger his right of going to law. But this nicety is now disregarded, though, in compliance with the ancient principle, the form of assigning a *chose* in action is in the nature of a declaration of trust and an agreement to permit the assignee to make use of the name of the assignor, in order to recover the possession. And, therefore, when in common acceptation a debt or bond is said to be assigned over, **it must still be sued in the original creditor's name,** the person to whom it is transferred being rather an attorney than an assignee.[4] But the king is an **exception** to this general rule, for he might always either grant or receive a *chose* in action by assignment, and our **courts of equity,** considering that in a commercial country almost all personal property must necessarily lie in contract, will protect the assignment of a *chose* in action as much as the law will that of a *chose* in possession.

This contract or agreement may be either express or implied. [443] **Express contracts** are where the terms of the agreement are openly uttered and avowed at the time of the making, as to deliver an ox, or ten loads of timber, or to pay a stated price for certain goods. **Implied** are such as reason and justice dictate, and which, therefore, the law presumes that every man undertakes to perform. As, if I

4. See Assignment, considered *ante.*

employ a person to do any business for me, or perform any work, the law implies that I undertook, or contracted to pay him as much as his labor deserves. If I take up wares from a tradesman without any agreement of price, the law concludes that I contracted to pay their real value.[5] And there is also one species of implied contracts which runs through and is annexed to all other contracts, conditions, and covenants, viz., that if I fail in my part of the agreement, I shall pay the other party such damages as he has sustained by such my neglect or refusal.[6]

A contract may also be either **executed**, as if A agrees to change horses with B, and they do it immediately, in which case the possession and the right are transferred together, or it may be **executory**, as if they agree to change next week. Here the right only vests, and their reciprocal property in each other's horse is not in possession, but in action; for a contract *executed* (which differs nothing from a grant) conveys *a chose in possession;* a contract *executory* conveys only a *chose in action.*

Having thus shown the general nature of a contract, we are, *secondly,* to proceed to the **consideration** upon which it is founded, or the reason which moves the contracting party to enter into the contract. [444] "It is an agreement upon *sufficient consideration.*" This thing, which is the price or motive of the contract, we call the consideration; and it must be a thing lawful in itself, or else the contract is void.[7] **A good consideration** is that of blood or natural affection between near relations; the satisfaction accruing from which the law esteems an equivalent for whatever benefit may move from one relation to another. This consideration may sometimes, however, be set aside, and the contract becomes void, when it tends in its consequences to defraud creditors or other third persons of their just rights. But a contract for any **valuable consideration**, as for marriage,

5. As much as they are reasonably worth.

6. See *ante,* note on Damages.

7. Where an agreement is illegal in part only, the part which is good may be enforced, if it can be separated from the part which is bad, but not otherwise. See, generally, as to the effect of illegality on the contract, Clark on Contracts (3d Ed.), 405-432 and cases in notes.

for money, for work done, or for other reciprocal contracts, can never be impeached at law, and if it be of a sufficient adequate value is never set aside in equity;[8] for the person contracted with has then given an equivalent to recompense, and is therefore as much an owner or a creditor as any other person.

A consideration of some sort or other is so absolutely necessary to the forming of a contract, that a nudum pactum [being a simple contract, for in a deed a consideration is conclusively presumed], or agreement to do or pay any thing on one side, without any compensation on the other, **is totally void in law,** and a man cannot be compelled to perform it.[9] But any degree of reciprocity will prevent the pact from being nude; nay, even if the thing be founded on a prior moral obligation (as a promise to pay a just debt, though barred by the statute of limitations), it is no longer *nudum pactum.*[1] The rule does not hold in some cases, where the promise is authentically proved by written documents. [446] For if a man enters into a **voluntary bond,** or gives a **promissory note,** he shall not be allowed to aver the want of a consideration in order to evade the payment, for every bond from the solemnity of the instrument, and every note from the subscription of the drawer [*prima facie* only in the latter case as between maker and payee] carries with it an internal evidence of a good consideration.

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8. See, however, the preceding note. Fraud, duress, infancy, mistake and many other things may constitute a defence. Clark on Contracts (3d Ed.), 272, 245, 297, 190 and cases cited in notes.

9 The author refers to simple contracts, for a seal at common law conclusively presumes a consideration. A valuable consideration is necessary to support a simple contract. It may be defined as some right, interest, profit or benefit accruing upon request, express or implied to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken upon like request by the other. See Clark on Contracts (3d Ed.), 133.

1. A mere moral obligation is not a sufficient consideration to support a promise unless it is based upon a preceding legal obligation which would be enforcible but for the operation of some positive rule of law, e. g., the bar of the Statute of Limitations. See note to Wennell v. Adney, 3 B. & P. 352; Eastwood v. Kenyon, 11 Adol. & Ell. 438; Clark on Contracts (3d Ed.), 136; Mills v. Wyman, 3 Pick. 207.

Courts of justice will therefore support them both as against the contractor himself, but not to the prejudice of creditors, or strangers to the contract.[2]

We are next to consider, *thirdly,* **the thing agreed to be done or omitted.** "A contract is an agreement upon sufficient consideration *to do or not to do a particular thing.*" **The most usual contracts,** whereby the right of chattels personal may be acquired in the laws of England, are 1. That of *sale* or *exchange;* 2. That of *bailment;* 3. That of *hiring* and *borrowing;* 4. That of *debt.*

1. **Sale, or exchange,** is a transmutation of property from one man to another, in consideration of some price or recompense in value, for there is no sale without a recompense: there must be *quid pro quo.* If it be a commutation of goods for goods, it is more properly an *exchange;* but if it be a transferring of goods for money, it is called a *sale.* With regard to the *law* of sales and exchanges, there is no difference. [447] I shall therefore treat of them both under the denomination of sales only.

Where the vendor hath in himself the property of the goods sold, he hath the liberty of disposing of them to whomsoever he pleases, at any time and in any manner, unless judgment has been obtained against him for a debt or damages, and the writ of execution is actually delivered to the sheriff. For then, by the statute of frauds, the sale shall be looked upon as fraudulent, and **the property of the goods shall be bound to answer the debt from the time of delivering the writ.** Formerly it was bound from the *teste,* or issuing of the writ, and any subsequent sale was fraudlent; but the law was thus altered in favor of *purchasers,* though it still remains the same between the *parties.* And therefore if a defendant dies after the awarding and before the delivery of the writ, his goods are bound by it in the hands of his executors.[3]

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2. In the hands of a *bona fide* purchaser the defence of want of consideration is not good; but as between the immediate parties to a promissory note want of a valuable consideration is a good defence. By the common law a seal is, as between the parties, conclusive evidence of a consideration. This rule has been changed by statute in many states.

3. In some states the goods are sub-

If a man agrees with another for goods at a certain price he may not carry them away before he hath paid for them, for it is no sale without payment, unless the contrary be expressly agreed.[4] And therefore, if the vendor says the

ject to the writ from the time of its delivery to the sheriff for service, and in others only from the time of its levy. Consult the local statutes and books on practice.

4. It has long been settled that delivery to an agent of the vendee (and for this purpose common carriers, packers, and wharfingers, are considered to stand in that character) is for most purposes a delivery to the vendee himself. But this species of delivery affords a security to the vendor, upon credit, which does not exist where the delivery is actually made to the vendee himself; for if the vendor discover that the vendee is insolvent, or has become bankrupt, he may seize upon the goods so sold upon credit, and delivered into the hands of such carrier, etc., at any time before their actual and complete delivery to the vendee. This branch of the law is called stoppage in transitu, and though not referred to in the text, may be properly stated in this place, from its importance in the concerns of trade and commerce. This law is founded upon an equitable right in the vendor to detain the goods until the price be paid or tendered, for stoppage in transitu does not rescind the contract of sale (1 Atk. 245, 3 T. R. 466, 6 East, 27); and if the vendor afterwards offer to deliver them, he may, unless he has resold them, recover the price which he could not do if by stopping in transitu the sale was rescinded. 1 Camp. 109; 6 Taunt. 162. The right extends to every case in which the contract is in effect a sale, and the consignor substantially the vendor of the goods. 3 East, 93; Amb. 399; 3 T. R. 783. It extends also to contracts of *exchange*, as to an agreement between consignor and consignee that the latter shall return another commodity of equal value in payment, and the fulfilment of which engagement is rendered hazardous by his insolvency. Sittings post M. Term, Guildhall, 1822; 3 Ch. C. L. 346. The consignor of goods for sale on the joint account of himself and the consignee, may exercise this right in the event of the bankruptcy or insolvency of the latter (6 East, 371); but it does not arise between principal and factor, for the property is never devested out of the principal, and the factor as against him has only a right of lien upon the goods, and he cannot, after parting with them, repossess himself of them while in transitu. 1 East, 4; 2 New. R. 64. Nor can the surety for the payment of the price of goods, by the vendee, though he may have accepted the bills drawn upon him by the consignee for that purpose, stop the goods in transitu. 1 Bos. & Pul. 563. If a party, being indebted to another, on the balance of accounts, including bills of exchange running accepted by the latter, consign goods to him on account of this balance, the consignor has no right to stop them in transitu, upon the consignee becoming insolvent before the bills are paid. 4 Campb. 31. If a sale be legalized by license, and the vendor be an alien enemy, he may

price of a beast is four pounds, and the vendee says he will give four pounds, the bargain is struck, and they neither of them are at liberty to be off, provided immediate posses-

stop the goods in transitu (15 East, 419); and any authorized agent of the consignor may exercise the right. See 1 Campb. 369. Though the consignment must be on credit, at least for some part of the price, yet partial payment, acceptance of bills on account of, and not as actual payment, or the vendor's being indebted to the vendee in part of the value, will not defeat the right to resume possession before actual delivery to the vendee. 7 T. R. 440, 64; 3 East, 93; 2 Vern. 203. It is necessary that the consignee should become bankrupt or be insolvent, for the vendor to exercise this right. 6 Robinson Ad. R. 321. It is not necessary that the vendor, to exercise this right of stoppage, should *actually* take possession of the property consigned by corporal touch; he may put in his claim or demand of his right to the goods in transitu, either verbally or in writing, and it will be equivalent in law to an actual stoppage of the goods, provided it be made before the transit has expired. 2 B. & P. 457, 462; 2 Esp. R. 613; Co. B. L. 494; 1 Atk. 245; Amb. 399; 3 East, 394. This right may be exercised by making out a new invoice or bill of lading (Holt, C. N. P. 338); but such a claim on the part of the *consignee* would not be sufficient to devest the former of his right. 2 Esp. 613; 5 East, 175; 14 East, 308. The *transitus* in goods continues till there has been an actual delivery to the vendee or his *agent expressly authorized* for that purpose, with the express or implied consent of the vendor to sanction such delivery. 3 T. R. 466; 5 East, 181. The delivery of goods to the master on board a ship wholly chartered by the consignee, is not such a delivery to the vendee as to put an end to the *transitus;* for the master is a carrier of both consignor and consignee; and till a ship is actually at the end of her voyage, the right of stoppage in transitu continues; and where a ship came into port without performing quarantine, when she ought to have done so, and the assignees of the consignee, who had become bankrupt, took possession of the goods, and the ship was ordered out of port to perform quarantine, where an agent of the consignor claimed the goods on behalf of his principal, it was held that the consignor had properly exercised and might claim a stoppage in transitu. 1 Esp. 240. And goods deposited in the king's warehouses under 26 Geo. III., c. 59, may be stopped in transitu, though they have been claimed by the consignee. 2 Esp. 663.

On the other hand, the *transitus* may be determined by delivery of the key of the warehouse where the goods are deposited to the vendee (3 T. R. 464, 8 T. R. 199); or payment of rent for such warehouse to the vendor, or to the wharfinger with the vendor's privity. 1 Campb. 452; 2 Camp. 243; 1 Marsh. 257, 8. And in all similar cases of constructive delivery and acceptance, the right to stoppage in transitu is at an end. See 7 Taun. 278; 2 Bar. & Cres. 540; 1 Ryan & Moody, N. P. C. 6, and 3 Chitty's Com. L. 340. See, also, Tiffany on Sales (2d Ed.), 322-338 and notes, where the cases are collected.

sion be tendered by the other side. But if neither the money be paid nor the goods delivered, nor tender made, nor any subsequent agreement be entered into, it is no contract, and the owner may dispose of the goods as he pleases. But if any part of the price is paid down, if it be but a penny, or any portion of the goods delivered by way of earnest, the property of the goods is absolutely bound by it; and the vendee may recover the goods by action, as well as the vendor may the price of them. [448] And such regard does the law pay to earnest as an evidence of a contract, that, by the same statute, 29 Car. II. c. 3,[5] **no contract for the sale of goods, to the value of ten pounds or more, shall be valid unless the buyer [accepts and] actually receives part of the goods sold, by way of earnest on his part, unless he gives part of the price to the vendor by way of earnest to bind the bargain, or in part of payment; or unless some note in writing be made and signed by the party or his agent who is to be charged with the contract. And with regard to goods under the value of ten pounds no contract or agreement for the sale of them shall be valid unless the goods are to be delivered within one year, or unless the contract be made in writing, and signed by the party or his agent who is to be charged therewith.**[6]

As soon as the bargain is struck, the property of the goods is transferred to the vendee, and that of the price to the vendor;[7] but the vendee cannot take the goods until he tenders the price agreed on. But if he tenders the money to the vendor, and he refuses it, the vendee may seize the goods, or have an action against the vendor for detaining them. And by a regular sale, without delivery, the property is so absolutely vested in the vendee, that if A sells a

5. Called the Statute of Frauds.

6. This section (17) of the statute has been re-enacted in substance in most of the states, but not in all. Consult the local statutes. See Tiffany on Sales (2d Ed.), 62; Clark on Contracts (3d Ed.), 121 *et seq.* It is not in force in Illinois, Alabama, Delaware, Kentucky, Louisiana, New Mexico, North Carolina, Ohio, Pennsylvania, Rhode Island, Tennessee, Texas, Virginia and West Virginia. Tiffany on Sales, 63 note. See, generally, Browne on the Statute of Frauds (5th Ed., 1895), and the works above cited.

7. Tiffany on Sales (2d Ed.), 2, 119.

horse to B for ten pounds and B pays him earnest, or signs a note in writing of the bargain, and afterwards, before the delivery of the horse, or money paid, the horse dies in the vendor's custody, still he is entitled to the money, because, by the contract the property was in the vendee. [449] Thus may property in goods be transferred by sale, where the vendor *hath* such property in himself.

But property may also in some cases be transferred by sale, though the vendor hath none at all in the goods. The general rule of law is, that all sales and contracts of anything vendible, in fairs or **markets overt**[8] (that is, open), shall not only be good between the parties, but also be binding on all those that have any right or property therein. But if my goods are stolen from me, and sold, out of market overt, my property is not altered, and I may take them wherever I find them.

By the civil law an implied warranty was annexed to every sale in respect to the title of the vendor, and so, too, in our law a purchaser of goods and chattels may have a satisfaction from the seller, if he sells them as his own and the title proves deficient, without any express warranty for that purpose.[9] [451] **But with regard to the goodness of the wares** so purchased, the vendor is not bound to answer, unless he expressly warrants them to be sound and

8. Tiffany on Sales (2d Ed.), 26.

As a general rule no one can convey a greater title than he has. Sales in market overt were an exception at common law, though not applicable to the United States.

A *bona fide* purchaser without notice, of bank notes, and negotiable paper before maturity, constitutes another exception. See the leading case of Miller v. Race, 1 Burr. 452; 1 Smith's Lead. Cases, *597 and notes.

A purchaser of goods whose title is defeasible by fraud may also convey a good title to a *bona fide* purchaser without notice of the fraud.

Again, the purchaser of real property, holding under an unrecorded deed, may lose his title by the prior record of a subsequent deed to a *bona fide* purchaser without notice. See the recording laws of the various states.

Again, one may estop himself from claiming his own personal property, if he suffers another to sell it as his own to a *bona fide* purchaser. There may be other exceptions arising under statutes. See, generally, Tiffany on Sales (2d Ed.), 26 *et seq.* and notes.

9. Tiffany on Sales (2d Ed.), 242, 243 and cases cited.

good, or unless he knew them to be otherwise, and hath used any art to disguise them, or unless they turn out to be different from what he represented them to the buyer.[1]

2. **Bailment is a delivery of goods in trust, upon a contract expressed or implied that the trust shall be faithfully executed on the part of the bailee.**[2] As if cloth be delivered

1. There is an implied warranty of quality or fitness, (1) where the buyer relying on the seller's skill and judgment, buys goods for a particular purpose made known to the vendor; (2) where the goods are bought by description from a seller dealing in such goods and the buyer has no opportunity to examine them; (3) where provisions are sold by a dealer for immediate consumption. Tiffany on Sales (2d Ed.), 352 *et seq.* and notes.

2. The elaborate judgment of Lord Holt in the celebrated case of Coggs v. Bernard (Lord Ray, 909; 1 Smith's Lead. Cases, *283), contains the first well-ordered exposition of the English law of bailments, and was imported by him into the common law from the Roman civil law. Since then it has grown to enormous proportions and includes not only ordinary bailments, but the law of common carriers. The "Essay on the Law of Bailments," by Sir Wm. Jones, the second edition of which was published in 1797, adopted substantially the classification of Lord Holt, which is still followed in treatises and cases upon the subject.

Lord Holt distributed all bailments into six classes, viz.:

1. *Depositum* or a naked bailment of goods to be kept for the use of the bailor without recompense.

2. *Commodatum,* where goods or chattels that are useful are lent to the bailee *gratis* to be used by him.

3. *Locatio rei,* where goods are delivered to the bailee to be used by him for hire.

4. *Vadium,* which is a pawn or pledge.

5. *Locatio operis faciendi,* where goods are delivered to be carried or something is to be done about them for a reward to be paid to the bailee.

6. *Mandatum,* a delivery of goods to somebody, who is to carry them or do something about them *gratis.*

Bailments are again divided into these, (1) for the exclusive benefit of the bailor; (2) for the exclusive benefit of the bailee, and (3) those for the benefit of both parties.

In the first class of cases the bailee is held only to slight care and is liable only for gross negligence. Deposits and mandates are of this sort.

In the second class, as in *commodatum,* the bailee is held to exercise great care and is liable for slight negligence.

In the third class the bailee is held to exercise ordinary care and is liable for ordinary negligence.

On grounds of public policy, innkeepers and common carriers, are, at common law, held to be insurers against everything except the act of the bailor, the act of God or the public enemy. In some states the innkeeper is not regarded as an insurer, but the loss of the goods makes him *prima facie* liable; but he may show himself not guilty of negligence. See local statutes. The extent to which common carriers may limit their lia-

or (in our legal dialect) bailed to a tailor to make a suit of clothes, he has it upon an implied contract to render it again when made, and that in a workmanly manner. If money or goods be delivered to a common carrier to convey from Oxford to London, he is under a contract in law to pay or carry them to the person appointed. If a horse or other goods be delivered to an inkeeper or his servants, he is bound to keep them safely, and restore them when his guest leaves the house. [452] If a man takes in a horse or other cattle to graze and depasture in his grounds, which the law calls **agistment**, he takes them upon an implied contract to return them on demand to the owner. If a pawnbroker receives plate or jewels as a pledge or security for the repayment of money lent thereon at a day certain, he has them upon an express contract or condition to restore them, if the pledgor performs his part by redeeming them in due time. And so if a landlord distreins goods for rent, or a parish officer for taxes, these for a time are only a pledge in the hands of the distreinors, and they are bound by an implied contract in law to restore them on payment of the debt, duty, and expenses, before the time of sale, or, when sold, to render back the overplus. If a friend delivers anything to his friend to keep for him, the receiver is bound to restore it on demand. And now the law seems to be settled that such a general bailment will not charge the bailee with any loss, unless it happens by gross neglect, which is an evidence of fraud; but if he undertakes specially to keep the goods safely and securely, he is bound to take the same care of them as a prudent man would take of his own.

In all these instances there is a special qualified property transferred from the bailor to the bailee, together with the possession. It is not an absolute property, because of his

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bility by notice and by contract has been productive of much litigation and the literature is too voluminous to be summarized. See, generally, Moore on Carriers, and Bender's Law Book Catalogue, 12, 13.

Common carriers of passengers are not insurers of the safety of their passengers, but are held to the utmost degree of care and diligence, so far as human skill and foresight can go. Moore on Carriers, 594 *et seq.* and cases cited.

contract for restitution, the bailor having still left in him the right to a *chose* in action grounded upon such contract. [453] And on account of this qualified property of the bailee he may (as well as the bailor) maintain an action against such as injure or take away these chattels. The tailor, the carrier, the innkeeper, the agisting farmer, the pawnbroker, the distreinor, and the general bailee may all of them vindicate, in their own right, this their **possessory interest** against any stranger or third person.

3. **Hiring and borrowing** are also contracts by which a qualified property may be transferred to the hirer or borrower, in which there is only this difference, that hiring is always for a price or stipend or additional recompense, borrowing is merely gratuitous. But the law in both cases is the same.[3] They are both contracts whereby the possession and a transient property is transferred for a particular time or use on condition to restore the goods so hired or borrowed as soon as the time is expired or use performed, together with the price or stipend (in case of hiring) either expressly agreed on by the parties or left to be implied by law according to the value of the service. By this mutual contract the hirer or borrower gains a temporary property in the thing hired, accompanied with an implied condition to use it with moderation and not to abuse it, and the owner or lender retains a reversionary interest in the same, and acquires a new property in the price or reward.

There is one species of this price or reward, the most usual of any, when money is lent on a contract to receive not only the principal sum again, but also an increase by way of compensation for the use, which generally is called **interest** by those who think it lawful, and **usury** by those who do not so.[4] [454] If a contract which carries interest

3. Their liability for negligence is different. See *supra*, note.

4. Usury is interest in excess of that allowed by law. The rates of conventional and nonconventional interest and the penalties for taking usury are fixed by statutes and vary in the several states. See Tyler on Usury, Pawns and Pledges (1873); Webb on Usury (1899). As to the law of usury in general, see, also, 3 Chitty's Com. L. 87 to 91, 310 to 316; R. B. Comyn on Usury; Ord. on Usury, and Howden on Usury.

be made in a foreign country, our courts will direct the payment of interest according to the law of that country in which the contract was made. Thus Irish, American, Turkish, and Indian interest have been allowed in our courts to the amount of even twelve per cent.; for the moderation or exorbitance of interest depends upon local circumstances, and the refusal to enforce such contracts would put a stop to all foreign trade. [464]

Sometimes the hazard may be greater than the rate of interest allowed by law will compensate. [457] And this

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There must be an unlawful *intent*, and therefore if the usury arise from error in computation, it will not vitiate. Cro. Car. 501; 2 Bla. Rep. 792; 1 Camp. 149. Exorbitant discount to induce the acceptor to take up a bill before it is due is not usurious, because there must be a loan or forbearance of payment, or some devise for the purpose of concealing, or evading the appearance of a loan or forbearance. 4 East, 55; 5 Esp. 11; Peake, 200; 1 B. & P. 144; 4 Taunt. 810. Nor if the charge alleged to be usurious is fairly referable to the trouble, expense, etc., in the transaction. 3 B. & P. 154; 4 M. & S. 192; 2 T. R. 238; 1 Mad. Rep. 112; 1 Camp. 177; 15 Ves. 120. Bankers may charge their usual commission beyond legal interest. 2 T. R. 52. Under the direction of the court, it is the province of the jury to determine when there is usury in a transaction. 4 M. & S. 192; 1 Dowl. & R. 570; 3 B. & A. 664; 2 Bla. Rep. 864. The purchase of an annuity at ever so cheap a rate, will not *prima facie* be usurious, but if it be for *years*, or an express agreement to repurchase and on calculation more than the principal with legal interest is to be returned, it will. 3 B. & P. 151; 3 B. & A. 666. And if part of the advance be in goods, it must be shown that they were not overcharged in price. Doug. 735; 1 Esp. 40; 2 Camp. 375; Holt, N. P. C. 256. A loan made returnable on a certain day, on payment of a sum beyond legal interest, on default thereof may be a *penalty* and not usurious interest, the intention of the parties being the criterion in all cases. If money be lent on risk at more than legal interest, and the casualty affects the *interest* only, it is usury, not so, if it affects the *principal also*. Cro. J. 508; 3 Wils. 395. The usury must be part of the contract in its inception, and being void in its commencement, it is so in all its stages, Doug. 735; 1 Stark. 385; though bills of exchange so tainted, are by the 58 Geo. III., c. 93, rendered valid in the hands of a *bona fide* holder, unless he has actual notice of the usury, but if the drawer of a bill transfer it for a valuable consideration, he cannot set up antecedent usury with the acceptor as a defence. 4 Bar. & Ald. 215. A security with legal interest only, substituted for one that is usurious, is valid. 1 Camp. 165 n.; 2 Taunt. 184; 2 Stark. 237 Taking usurious interest on a *bona fide* debt, does not destroy the debt. 1 H. B. 462; 1 T. R 153; 2 Ves. 567; 1 Saund. 295.

gives rise to the practice of, 1. Bottomry, or *respondentia;* 2. Policies of insurance; 3. Annuities upon lives.

And first, **bottomry**[5] is in the nature of a mortgage of a ship, when the owner takes up money to enable him to carry on his voyage, and pledges the keel or *bottom* of the ship (*partem pro toto*) as a security for the repayment. In which case it is understood that if the ship be lost the lender loses also his whole money, but if it returns in safety, then he shall receive back his principal, and also the premium or interest agreed upon, however it may exceed the legal rate of interest. And this is allowed to be a valid contract in all trading nations for the benefit of commerce, and by

5. See in general, Abbott on Shipping, 143; 2 Holt, 398; 3 Chitty's Com. L. 313 to 316. The general nature of *a respondentia* bond is this, the borrower binds himself in a large penal sum, upon condition that the obligation shall be void, if he pay the lender the sum borrowed and so much a month from the date of the bond till the ship arrives at a certain port, or if the ship be lost or captured in the course of the voyage. The respondentia interest is frequently at the rate of forty or fifty *per cent.* or in proportion to the risk and profit of the voyage. The respondentia lender may insure his interest in the success of the voyage, but it must be expressly specified in the policy to be respondentia interest (3 Burr. 1391); unless there is a particular usage to the contrary. Park. Ins. 11. A lender upon respondentia is not obliged to pay salvage or average losses, but he is entitled to receive the whole sum advanced, provided the ship and cargo arrive at the port of destination; nor will he lose the benefit of the bond, if an accident happens by the default of the borrower or the captain of the ship. Ib., 421. Nor will a *temporary* capture, or any damage short of the destruction of the ship, defeat his claim. 2 Park. 626, 7; 1 M. & S. 30.

Where bottomry bonds are sealed, and the money paid, the person borrowing runs the hazard of all injuries by storm, fire, etc., before the beginning of the voyage, unless it be otherwise provided. As, that, if the ship shall *not arrive at such* a place at such a time, etc., then the contract hath a beginning from the time of sealing; but if the condition be, that if such ship shall *sail from London* to any port abroad, and shall not arrive there, etc., then, etc., the contingency hath not its beginning till the departure. Beawes Lex. Merc. 143; Park. 626. A lender on bottomry or respondentia is not liable to contribute in the case of general average, nor is he entitled to the benefit of salvage. Park. 627, 629; 4 M. & Selw. 141. See, however, Marshal on Insurance, 6 Ch. book 2. In the case of hypothecation, the lender may recover the ship itself in the admiralty court, but not in bottomry or respondentia. See 6 Moore, 397.

See in general, Park & Marshal on Insurances, and 3 Chitty Com. L. 445 to 536.

reason of the extraordinary hazard run by the lender. [458] And in this case the ship and tackle, if brought home, are answerable (as well as the person of the borrower) for the money lent. But if the loan is not upon the vessel, but upon the goods and merchandise, which must necessarily be sold or exchanged in the course of the voyage, then only the borrower personally is bound to answer the contract; who therefore in this case is said to take up money at **respondentia.**

Secondly, a policy of **insurance** is a contract between A and B, that upon A's paying a premium equivalent to the hazard run, B will indemnify or insure him against a particular event. Insurances being contracts, the very essence of which consists in observing the purest good faith and integrity, they are vacated by any the least shadow of fraud or undue concealment.[6] [460]

4. **By a debt, a chose in action, or right to a certain sum of money, is mutually acquired and lost.** This may be the counterpart of, and arise from any of the other species of contracts. As in case of a sale, where the price is not paid in ready money, the vendee becomes indebted to the vendor for the sum agreed on, and the vendor has a property in this price, as a *chose* in action, by means of this contract of debt. **Any contract, in short, whereby a determinate sum of money becomes due to any person and is not paid, but remains in action merely, is a contract of debt.** And taken in this light, it comprehends a great variety of acquisition, being usually divided into debts of **record,** debts by **special,** and debts by **simple contract.** [465]

A debt of record is a sum of money which appears to be due by the evidence of a court of record.[7] Thus, when any specific sum is adjudged to be due from the defendant to

6. It may also be laid down as a general rule applicable to all sorts of insurance, that the party insured must have an *interest* in the subject-matter of the insurance, and that if he has not the policy is what is called a *wagering policy*, and void. See, generally, as to fire, life and marine insurance, Arnold on Marine Insurance, 2 vols. (1901); May on Insurance, 2 vols. (1900); Vance on Insurance (1904); Pingrey on Suretyship and Guaranty (2d Ed., 1913).

7. At common law an action of debt lies upon a judgment for money.

the plaintiff on an action or suit at law, this is a contract of the highest nature, being established by the sentence of a court of judicature. **Debts upon recognizance**[8] are also a sum of money, recognized or acknowledged to be due to the crown or a subject, in the presence of some court or magistrate, with a condition that such acknowledgment shall be void upon the appearance of the party, his good behavior, or the like; and these, together with statutes merchant and statutes staple, &c., if forfeited by non-performance of the condition, are also ranked among this first and principal class of debts, viz., debts of record.

Debts by specialty,[9] or special contract, are such whereby a sum of money becomes, or is acknowledged to be due by deed or instrument under seal. Such as by deed of covenant, by deed of sale, by lease reserving rent, or by bond or obligation.

Debts by simple contract[1] are such where the contract upon which the obligation arises is neither ascertained by matter of record nor yet by deed or special instrument, but by mere oral evidence, the most simple of any, or by notes unsealed, which are capable of a more easy proof, and (therefore only) better than a verbal promise. [466] It is easy to see into what a vast variety of obligations this last class may be branched out, through the numerous contracts for money, which are not only expressed by the parties, but virtually implied in law. I shall only observe at present that, **by the statute 29 Car. II. c. 3, no executor or administrator shall be charged upon any special promise to answer damages out of his own estate, and no person shall be charged upon any promise to answer for the debt or default of another, or upon any agreement in consideration of marriage, or upon any contract or sale of any real estate, or upon any agreement that is not to be performed within one year from the making, unless the agreement of some memorandum thereof be in a writing, and signed by the party himself or by his authority.**[2]

8. Enforced at common law by writ of *scire facias.*

9. Enforcible by action of debt.

1. Enforcible by action of debt or assumpsit.

2. This section of the Statute of

But there is one species of debts upon simple contract which deserves a more particular regard. These are debts by *bills of exchange* and *promissory notes.*

A bill of exchange is an open letter of request from one man to another, desiring him to pay a sum named therein to a third person on his account;[3] by which means a man at the most distant part of the world may have money remitted to him from any trading country. In common speech such a bill is frequently called a *draft,* but a *bill of exchange* is the more legal as well as mercantile expression. The person, however, who writes this letter is called in law the *drawer,* and he to whom it is written the drawee [after he has accepted it he is called the *acceptor*]; and the third person, or negotiator, to whom it is payable (whether especially named, or the *bearer* generally) is called the *payee.*

These bills are either foreign or inland: *foreign,* when drawn by a merchant residing abroad upon his correspondent in England, or *vice versa;* and *inland,* when both the drawer and the drawee reside within the kingdom. Formerly foreign bills of exchange were much more regarded in the eye of the law than inland ones, as being thought of more public concern in the advancement of trade and commerce. But now by two statutes, the one 9 & 10 W. III. c. 17, the other 3 & 4 Anne, c. 9, inland bills of exchange are put upon the same footing as foreign ones; what was

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Frauds has been re-enacted in substance in most, if not all, the states. It has occasioned so much litigation that every word of it is said to have cost a subsidy. See, generally, Browne on Statute of Frauds, 5th Ed., (1895); Clark on Contracts (3d Ed.), 78-132; Tiffany on Sales (2d Ed.), chap. 2.

3. Eaton & Gilbert Com. Paper (1903), 4.

In 1882 Great Britain enacted a "Bills of Exchange Act" (45 & 46 Vict., c. 61); and in many of the states of this country more recently the so-called "Negotiable Instruments Law" has been enacted. With slight changes it has become the law in 47 states, territories and possessions of the United States. In 16 of these the section numbering is the same. This statute is mainly declaratory of the common law. For a list of the states in which it is effective, tables showing the numbering of the sections in different states and the statute itself, see Norton on Bills and Notes (4th Ed., 1914), pages 601 to 656. The statute is too voluminous to be here reproduced.

the law and custom of merchants[4] with regard to the one, and taken notice of merely as such, being by those statutes expressly enacted with regard to the other. So that now there is not in law any manner of difference between them [except that in the case of foreign bills protest is necessary].[5]

Promissory notes, or notes of hand, are a plain and direct engagement in writing to pay a sum specified at the time therein limited to a person therein named, or sometimes to his order, or often to the bearer at large.[6] These also, by the same statute, 3 & 4 Anne, c. 9, are made assignable and indorsable in like manner as bills of exchange.

[468] The payee, either of a bill of exchange or promissory note, has clearly a property vested in him (not indeed in possession but in action) by the *express* contract of the drawer in the case of a promissory note, and, in the case of a bill of exchange, by his *implied contract,* viz., that, provided the drawee does not pay the bill, the drawer will: for which reason it is usual in bills of exchange to express that the *value* thereof hath been *received* by the drawer; in order to shew the consideration, upon which the implied contract of repayment arises. **And this property may be transferred and assigned from the payee to any other man; contrary to the general rule of common law, that no chose in action is assignable:** which assignment is the life of paper credit.

In the first place, then, the payee, or person to whom or whose *order* such bill of exchange or promissory note is payable, may by **indorsement, or writing his name in dorso,** or on the back of it, assign over his whole property to the bearer, or else to another person by name, either of whom is then called the indorsee; and he may assign the same to

4. These customs are now and long have been a part of the general law of the land, i. e., are a part of the common law. 2 Bouvier Law Dict. Law Merchant, and authorities cited; Eaton & Gilbert on Commercial Paper, 3 and cases cited.

5. See Buckner v. Finley, 2 Pet. (U. S.) 586.

6. Eaton & Gilbert, Com. Paper, 17. As to other forms of commercial paper, viz., due bills and I. O. U.'s, certificates of deposit, checks, bills of lading, letters of credit, bonds and coupons and certificates of stock, see Eaton & Gilbert (*supra*), 23-38 and notes. See vol. 2 of this series.

another, and so on *in infinitum*.[7] And a promissory note, payable to A or *bearer*, is negotiable without any indorsement, and payment thereof may be demanded by any bearer of it. But in case of a bill of exchange, the payee, or the indorsee (whether it be a general or particular indorsement), is to go to the drawee and offer his bill for **acceptance**; which acceptance (so as to charge the drawer with costs) must be in writing, under or on the back of the bill.[8] [469] If the drawee accepts the bill, either verbally or in writing, he then makes himself liable to pay it; this being now a contract on his side, grounded on an acknowledgment that the drawer has effects in his hands, or at least credit sufficient to warrant the payment. If the drawee refuses to accept the bill, and it be of the value of 20*l.* or upwards, and expressed to be for value received, the payee or indorsee may **protest it for non-acceptance**, which protest must be made in writing, under a copy of such bill of exchange, by some notary public; or, if no such notary be resident in the place, then by any other substantial inhabitant in the presence of two credible witnesses, and **notice of such protest** must, within fourteen days after, be given to the drawee.[9]

But in case such bill be accepted by the drawee, and after acceptance he fails or refuses to pay it within three days after it becomes due (which three days are called **days of grace**),[1] the payee or indorsee is then to get it **protested for non-payment**[2] in the same manner and by the same person who are to protest it in case of non-acceptance, and

7. See Eaton & Gilbert, Com. Paper, 317, 352 and cases cited.

8. Except as changed by statute the acceptance of a bill of exchange may be verbal as well as written. Eaton & Gilbert Com. Paper, 594 and cases collected in the notes. The usual form of acceptance is by writing upon the face of the bill the word "accepted" with the signature of the drawee subscribed. Eaton & Gilbert, Com. Paper, 595.

9. Acceptance is now only necessary when the bill is payable a certain time after sight. Notice must now be given to the immediate indorser, within a reasonable time, usually the next day. Eaton & Gilbert, Com. Paper, 502-507. See local statutes.

1. See Eaton & Gilbert, Com. Paper, 476. Days of grace are abolished by statute in some of the states.

2. See, generally, Eaton & Gilbert, Com. Paper, 611. Regulated by statute in some states. Id.

such protest must also be notified, within fourteen days after, to the drawer. And he, on producing such protest, either of non-acceptance or non-payment, is bound to make good to the payee or indorsee, not only the amount of the said bills (which he is bound to do within a reasonable time after non-payment, without any protest, by the rules of the common law), but also interest and all charges, to be computed from the time of making such protest. But if no protest be made or notified to the drawer, and any damage accrues by such neglect, it shall fall on the holder of the bill. The bill when refused must be demanded of the drawer as soon as conveniently may be; for though, when one draws a bill of exchange, he subjects himself to the payment, if the person on whom it is drawn refuses either to accept or pay, yet that is with this limitation, that if the bill be not paid when due, the person to whom it is payable shall in convenient time give the drawer notice thereof, for otherwise the law will imply it paid. Since it would be prejudicial to commerce if a bill might rise up to charge the drawer at any distance of time, when in the mean time all reckonings and accounts may be adjusted between the drawer and the drawee. [470]

If the bill be an indorsed bill, and the indorsee cannot get the drawee to discharge it, he may call upon either the drawer or the indorser, or if the bill has been negotiated through many hands, upon any of the indorsers; for **each indorser is a warrantor for the payment of the bill,**[3] which is frequently taken in payment as much (or more) upon

3. The Negotiable Instruments Law of New York, § 115, which is declaratory of the common law, provides that "Every indorser who indorses without qualification, warrants to all subsequent holders in due course:

"1. That the instrument is genuine and in all respects what it purports to be;

"2. That he has a good title to it;

"3. That all prior parties had capacity to contract;

"4. That the instrument is at the time of his indorsement valid and subsisting and in addition he engages that on due presentment it shall be accepted or paid, or both, as the case may be, according to its terms; and that if dishonored and the necessary proceedings on dishonor be duly taken, he will pay the amount thereof to the holder or to any subsequent indorser who may be compelled to pay it." Eaton & Gilbert, Com. Paper, 418, 424 and cases cited.

the credit of the indorser as of the drawer. And if such indorser, so called upon, has the names of one or more indorsers prior to his own, to each of whom he is properly an indorsee, he is also at liberty to call upon any of them to make him satisfaction, and so upwards. But the first indorser has nobody to restort to but the drawer only.

What has been said of bills of exchange is applicable also to promissory notes that are indorsed over and negotiated from one hand to another, only that in this case, as there is no drawee, there can be no protest for non-acceptance; or rather, the law considers a promissory note in the light of a bill drawn by a man upon himself and accepted at the time of drawing. And in case of non-payment by the drawer, the several indorsees of a promissory note have the same remedy as upon bills of exchange against the prior indorsers.

CHAPTER XXXI.

OF TITLE BY BANKRUPTCY.[1]

X. **Bankruptcy**; a title which we before lightly touched upon.[2] At present we are to treat of it more minutely, as it principally relates to the disposition of **chattels**, in which the property of persons concerned in trade more usually consists, than in lands or tenements. Let us, therefore, first of all consider, 1. **Who may become a bankrupt**: 2. **What acts make a bankrupt**: 3. **The proceedings on a commission of bankrupt**: and, 4. **In what manner an estate in goods and chattels may be transferred by bankruptcy.**

1. **Who may become a bankrupt.**[2a] A bankrupt was before[3] defined to be "a trader, who secretes himself," or "does certain other acts, tending to defraud his creditors." He was formerly considered merely in the light of a criminal or offender. [472] But at present the laws of bankruptcy are considered as laws calculated for the benefit of trade, and founded on the principles of humanity as well as justice; and to that end they confer some *privileges*, not only on the creditors, but also on the bankrupt or debtor himself. *On the creditors, by compelling the bankrupt to give up all his effects to their use*, without any fraudulent concealment: *on the debtor, by exempting him from the rigor of the general law*, whereby his person might be confined at the discretion of his creditor, though in reality he has nothing to satisfy the debt: whereas the law of bankrupts taking into consideration the sudden and unavoidable accidents to which men in trade are liable, has given them the liberty of their

1. The United States Bankruptcy Acts of 1800, 1841, 1867, 1898, with the amendments of 1903, 1906 and 1910, will be found printed in full in the 10th Edition of Collier on Bankruptcy (1914), 1337-1420.

2. See page *285.

2a. Under the present act of Congress (1910), any person who owes debts in any amount, no matter how small, may file a voluntary petition in bankruptcy. Collier on Bankruptcy (10th Ed.), 121. Corporations may become voluntary bankrupts. Id. 122. As to who may be adjudged involuntary bankrupts, see Id. 127. The debtor must owe at least $1,000. Id.

3. Ibid.

persons, and some pecuniary emoluments, upon condition they surrender up their whole estate to be divided among their creditors.

The first statute made concerning any English bankrupts was 34 Hen. VIII. c. 4, when trade began first to be properly cultivated in England: which has been almost totally altered by statute 13 Eliz. c. 7, whereby bankruptcy is confined to such persons only as have *used the trade of merchandise,* in gross or by retail, by way of bargaining, exchange, re-change, bartering, chevisance, or otherwise; or have *sought their living by buying and selling.* And by statute 21 Jac. I. c. 19, persons using the trade or profession of a *scrivener,* receiving other men's monies and estates into their trust and custody, are also made liable to the statutes of bankruptcy; and the benefits, as well as the penal parts of the law, are [475] extended as well to *aliens* and *denizens* as to natural-born subjects; being intended entirely for the protection of trade, in which aliens are often as deeply concerned as natives.[4] By many subsequent statutes, but lastly by statute 5 Geo. II. c. 30, *bankers, brokers,* and *factors,* are declared liable to the statutes of bankruptcy; and this upon the same reason that scriveners are included by the statute of James I., viz., for the relief of their creditors; whom they have otherwise more opportunities of defrauding than any other set of dealers; and they are properly to be looked upon as traders, since they make merchandise of money, in the same manner as other merchants do of goods and other moveable chattels. But by the same act, no *farmer, grazier,* or *drover,* shall (as such) be liable to be deemed a bankrupt: for, though they buy and sell corn, and hay, and beasts, in the course of husbandry, yet trade is not their principal, but only a collateral, object; their chief concern being to manure and till the ground, and make the best advantage of its produce. A *receiver of the king's taxes* is not capable, as such, of being a bankrupt; lest the king should be defeated of those extensive remedies against his debtors, which are put into his hands by the prerogative. By the same statute, no person shall have a commission of bankrupt

4. See now 46 & 47 Vict., ch. 52.

awarded against him, unless at the petition of some *one* creditor, to whom he owes 100*l.*; or of *two*, to whom he is indebted 150*l.*; or of *more*, to whom altogether he is indebted 200*l.* For the law does not look upon persons whose debts amount to less, to be traders considerable enough, either to enjoy the benefit of the statutes themselves, or to entitle the creditors, for the benefit of public commerce, to demand the distribution of their effects.[5] [476]

One single act of buying and selling will not make a man a trader; but a repeated practice, and profit by it. Buying and selling bank-stock, or other government securities, will not make a man a bankrupt; they not being goods, wares, or merchandise, within the intent of the statute, by which a profit may be fairly made. Neither will buying and selling under particular restraints, or for particular purposes; as, if a commissioner of the navy uses to buy victuals for the fleet, and disposes of the surplus and refuse, he is not thereby made a trader within the statutes. [477] **An infant,**[6] though a trader, cannot be made a bankrupt; for an infant can owe nothing but for necessaries: and the statutes of bankruptcy create no new debts, but only give a speedier and more effectual remedy for recovering such as were before due: and no person can be made a bankrupt for debts which he is not liable at law to pay. But a feme-covert in London, being a sole trader according to the custom, is liable to a commission of bankrupt.[7]

2. **By what acts a man may become a bankrupt.** A bankrupt is "a trader, who secretes himself, or does certain other acts, tending to defraud his creditors." In general whenever such a trader, as is before described, hath endeavored to avoid his creditors, or evade their just demands, this hath been declared by the legislature to be an act of bankruptcy, upon which a commission may be sued out. For, in this extrajudicial method of proceeding, which is allowed merely for the benefit of commerce, the law is

5. The debtor in the United States must owe at least $1,000. Collier on Bankruptcy, 127.

6. Collier on Bankruptcy, 124.

7. They may become bankrupts in all the states where they can contract debts. Id., 126.

extremely watchful to detect a man whose circumstances are declining, in the first instance, or at least as early as possible; that the creditors may receive as large a proportion of their debts as may be; and that a man may not go on wantonly wasting his substance, and then claim the benefit of the statutes, when he has nothing left to distribute.

To learn what the particular acts of bankruptcy are, which render a man a bankrupt, we must consult the several statutes, and the resolutions formed by the courts thereon. [478] Among these may therefore be reckoned, 1. *Departing from the realm,* whereby a man withdraws himself from the jurisdiction and coercion of the law, with intent to defraud his creditors. 2. Departing from his own house, with intent to secrete himself, and avoid his creditors. 3. Keeping in his own house, privately, so as not to be seen or spoken with by his creditors, except for just and necessary cause, which is likewise construed to be an intention to defraud his creditors, by avoiding the process of the law. 4. Procuring or suffering himself willing to be arrested, or outlawed, or imprisoned, without just and lawful cause; which is likewise deemed an attempt to defraud his creditors. 5. Procuring his money, goods, chattels, and effects, to be attached or sequestered by any legal process; which is another plan and direct endeavor to disappoint his creditors of their security. 6. Making any fraudulent conveyance to a friend, or secret trustee, of his lands, tenements, goods, or chattels; which is an act of the same suspicious nature with the last. 7. Procuring any protection, not being himself privileged by parliament, in order to screen his person from arrests; which also is an endeavor to elude the justice of the law. 8. Endeavoring or desiring, by any petition to the king, or bill exhibited in any of the king's courts against any creditors, to compel them to take less than their just debts; or to procrastinate the time of payment originally contracted for; which are an acknowledgment of either his poverty or his knavery. 9. Lying in prison for two months, or more, upon arrest or other detention for debt, without finding bail in order to obtain his

liberty. 10. Escaping from prison after an arrest for a just debt of 100*l.* or upwards. [479] For, no man would break prison, that was able and desirious to procure bail; which brings it within the reason of the last case. 11. Neglecting to make satisfaction for any just debt to the amount of 100*l.* within two months after service of legal process for such debt, upon any trader having privilege of parliament.

These are the several acts of bankruptcy, expressly defined by the statutes relating to this title,[8] which being so numerous, and the whole law of bankrupts being an innovation on the common law, our courts of justice have been tender of extending or multiplying acts of bankruptcy by any construction or implication.

3. **The proceedings on a commission of bankrupt**; so far as they affect the bankrupt himself. [480] And these depend entirely on the several statutes of bankruptcy; all which I shall endeavor to blend together, and digest into a concise methodical order.

And, first, there must be a **petition**[9] to the Lord Chancellor by one creditor to the amount of 100*l.*, or by two to the amount of 150*l.*, or by three or more to the amount of 200*l.*; which debts must be proved by *affidavit*, upon which he grants a **commission** to such discreet persons as to him shall seem good, who are then stiled commissioners of bankrupt. The petitioners, to prevent malicious applications, must be bound in a security of 200*l.* to make the party amends in case they do not prove him a bankrupt. When the com-

8. The acts of bankruptcy under the United States statute consist in general terms of (1) fraudulently conveying or concealing, etc., of his property with intent to defraud his creditors; (2) a preference by transfer of his property while insolvent, of one or more of his creditors; (3) suffering a creditor to obtain a preference by legal proceedings, etc.; (4) making a general assignment for the benefit of his creditors, or being insolvent applying for a receiver; or (5) admitting in writing his inability to pay his debts and his willingness to be adjudged a bankrupt.

9. As to the petition, process, pleadings and adjudication, see, generally, Collier on Bankruptcy (10th Ed., 1914), 406 *et seq.* The scope of this work will not warrant the space necessary for a full consideration of this subject. See, generally, Collier on Bankruptcy, which is the most recent work on this subject.

mission is awarded and issued, the commissioners are to meet, at their own expense, and to take an oath for the due execution of their commission, and to be allowed a sum not exceeding 20*s.* *per diem* each, at every sitting. And no commission of bankrupt shall abate, or be void, upon any demise of the crown.

When the commissioners have received their commission, they are first to receive proof of the person's being a trader, and having committed some act of bankruptcy; and then to declare him a bankrupt, if proved so; and to give notice thereof in the Gazette, and at the same time to appoint three meetings. At one of these meetings an election must be made of assignees, or persons to whom the bankrupt's estate shall be assigned, and in whom it shall be vested for the benefit of the creditors; which assignees are to be chosen by the major part, [481] in value, of the creditors who shall then have proved their debts: but may be originally appointed by the commissioners, and afterwards approved or rejected by the creditors: but no creditor shall be admitted to vote in the choice of assignees, whose debt on the balance of accounts does not amount to 10*l.* And at the third meeting, at farthest, which must be on the forty-second day after the advertisement in the Gazette (unless the time be enlarged by the Lord Chancellor), the bankrupt, upon notice also personally served upon him, or left at his usual place of abode, must surrender himself personally to the commissioners; which surrender (if voluntary) protects him from all arrests till his final examination is past: and he must thenceforth in all respects conform to the directions of the statutes of bankruptcy; or, in default of either surrender or conformity, shall be guilty of felony without benefit of clergy, and shall suffer death, and his goods and estate shall be distributed among his creditors.[1]

In case the bankrupt absconds, or is likely to run away, between the time of the commission issued, and the last day of surrender, he may by warrant from any judge or justice of the peace be apprehended and committed to the county gaol, in order to be forthcoming to the commissioners; who

1. The rigor of the law has in this respect been relaxed.

are also empowered immediately to grant a warrant for seizing his goods and papers.

When the bankrupt appears, the commissioners are to examine him touching all matters relating to his trade and effects. They may also summon before them, and examine the bankrupt's wife and any other person whatsoever, as to all matters relating to the bankrupt's affairs. And in case any of them shall refuse to answer, or shall not answer fully, to any lawful question, or shall refuse to subscribe such their examination, the commissioners may commit them to prison without bail, till they submit themselves and make and sign a full answer; the commissioners specifying in their warrant of commitment the question so refused to be answered. And any gaoler permitting such person to escape or go out of prison, shall forfeit 500*l.* to the creditors.

The bankrupt, upon this examination, is bound upon pain of death, [482] to make a full discovery of all his estate and effects, as well in expectancy as possession, and how he has disposed of the same; together with all books and writings relating thereto: and is to deliver up all in his own power to the commissioners (except the necessary apparel of himself, his wife, and his children); or, in case he conceals or embezzles any effects to the amount of 20*l.*, or withholds any books or writings, with intent to defraud his creditors, he shall be guilty of felony without benefit of clergy; and his goods and estates shall be divided among his creditors. And unless it shall appear that his inability to pay his debts arose from some casual loss, he may, upon conviction by indictment of such gross misconduct and negligence, be set upon the pillory for two hours, and have one of his ears nailed to the same and cut off.

After the time allowed to the bankrupt for such discovery is expired, any other person voluntarily discovering any part of his estate, before unknown to the assignees, shall be entitled to *five per cent.* out of the effects so discovered, and such further reward as the assignees and commissioners shall think proper. And any trustee wilfully concealing the estate of any bankrupt, after the expiration of the two and forty days, shall forfeit 100*l.*. and double the value of the estate concealed, to the creditors.

Hitherto, every thing is in favor of the creditors; and the law seems to be pretty rigid and severe against the bankrupt; but, in case he proves honest, it makes him full amends for all this rigor and severity. For, if the bankrupt hath made an ingenuous discovery (of the truth and sufficiency of which there remains no reason to doubt), and hath conformed in all points to the directions of the law; and if, in consequence thereof, the creditors, or four parts in five of them in number and value (but none of them creditors for less than 20*l.*), will sign a certificate to that purport; the commissioners are then to authenticate such certificate under their hands and seals, and to transmit it to the Lord Chancellor; and he, or two of the judges whom he shall appoint, on oath made by the bankrupt that such certificate was obtained without fraud, may allow the same; or disallow it, upon cause shewn by any of the creditors of the bankrupt. [483]

If no cause be shewn to the contrary, the certificate is allowed of course; and then the bankrupt is entitled to a decent and reasonable allowance out of his effects, for his future support and maintenance, and to put him in a way of honest industry. This allowance is also in proportion to his former good behavior, in the early discovery of the decline of his affairs, and thereby giving his creditors a larger dividend. For, if his effects will not pay one-half of his debts, or ten shillings in the pound, he is left to the discretion of the commissioners and assignees, to have a competent sum allowed him, not exceeding *three per cent.;* but if they pay ten shillings in the pound, he is allowed *five per cent.;* if twelve shillings and six-pence, then *seven and a half per cent.;* and if fifteen shillings in the pound, then the bankrupt shall be allowed *ten per cent.;* provided that such allowance do not, in the first case, exceed 200*l.*, in the second, 250*l.*, and in the third, 300*l.*

Besides this allowance, he has also an indemnity granted him, of being **free and discharged for ever from all debts** owing by him at the time he became a bankrupt; even though judgment shall have been obtained against him, and he lies in prison upon execution for such debts; and, for that, among other purposes, all proceedings on commissions

of bankrupt are, on petition, to be entered of record, as a perpetual bar against actions to be commenced on this account: though, in general, the production of the certificate, properly allowed, shall be sufficient evidence of all previous proceedings. Thus, the bankrupt becomes a clear man again: and, by the assistance of his allowance and his own industry, may become a useful member of the commonwealth; which is the rather to be expected, as he cannot be entitled to these benefits, unless his failures have been owing to misfortunes, rather than to misconduct and extravagance. [484]

4. **How such proceedings affect or transfer the estate and property of the bankrupt.** At present, we are only to consider the transfer of things *personal* by this operation of law.

By virtue of the statutes before mentioned, *all the personal estate and effects of the bankrupt are considered as vested, by the act of bankruptcy, in the future assignees of his commissioners,* whether they be goods in actual *possession,* or debts, contracts, and other choses in *action:* and the commissioners by their warrant may cause any house or tenement of the bankrupt to be broke open, in order to enter upon and seize the same. And when the assignees are chosen or approved by the creditors, the commissioners are to assign every thing over to them; and the property of every part of the estate is thereby as fully vested in them, as it was in the bankrupt himself, and they have the same remedies to recover it.

The property vested in the assignees is the whole that the bankrupt had in himself, at the time he committed the first act of bankruptcy, or that has been vested in him since, before his debts are satisfied or agreed for. Therefore, it is usually said, that once a bankrupt, and always a bankrupt; by which is meant, that a plain direct act of bankruptcy once [486] committed cannot be purged or explained away by any subsequent conduct, as a dubious equivocal act may be; but that, if a commission is afterwards awarded, the commission and the property of the assignee shall have a relation, or reference, back to the first and original act of bankruptcy.

Insomuch that all transactions of the bankrupt are from that time absolutely null and void, either with regard to the alienation of his property, or the receipt of his debts from such as are privy to his bankruptcy; for they are no longer his property, or his debts, but those of the future assignees. And if an execution be sued out, but not served and executed on the bankrupt's effects, till after the act of bankruptcy, it is void as against the assignees. But the king is not bound by this fictitious relation, nor is he within the statutes of bankrupts, for, if, after the act of bankruptcy committed, and before the assignment of his effects, an extent issues for the debt of the crown, the goods are bound thereby.

The assignees may pursue any *legal* method of recovering this property so vested in them, by their own authority; but [487] cannot commence a suit in *equity,* nor compound any debts owing to the bankrupt, nor refer any matters to arbitration, without the consent of the creditors, or the major part of them in value, at a meeting to be held in pursuance of notice in the Gazette.

When they have got in all the effects they can reasonably hope for, and reduced them to ready money, the assignees must, after four and within twelve months after the commission issued, give one-and-twenty days' notice to the creditors of a meeting for a dividend or distribution; at which time they must produce their accounts, and verify them upon oath, if required. And then the commissioners shall direct a dividend to be made, at so much in the pound, to all creditors who have before proved, or shall then prove, their debts. This dividend must be made equally, and in a rateable proportion, to all the creditors, according to the *quantity* of their debts; no regard being had to the *quality* of them. Mortgages, indeed, for which the creditor has a real security in his own hands, are entirely safe; for the commission of bankrupt reaches only the equity of redemption. So are also personal debts, where the creditor has a chattel in his hands, as a pledge or pawn for the payment, or has taken the debtor's lands or goods in execution. And, upon the equity of the statute 8 Ann. c. 14 (which directs, that, upon all executions of goods being on any premises demised to a tenant, one

year's rent, and no more, shall, if due, be paid to the landlord), it hath also been held, that, under a commission of bankrupt, which is in the nature of a statute-execution, the landlord shall be allowed his arrears of rent to the same amount, in preference to other creditors, even though he hath neglected to distrain, while the goods remained on the premises; which he is otherwise entitled to do for his entire rent, be the *quantum* what it may. But, otherwise, *judgments and recognizances* (both which are debts of record, and therefore at other times have a priority), and also bonds and obligations by deed or special instrument (which are called debts by specialty, and are usually the next in order), these are all put on a level with debts by mere simple contract, and all paid *pari passu.*[2] [488]

Within eighteen months after the commission issued, a second and final dividend shall be made, unless all the effects where exhausted by the first. And if any surplus remains, after selling his estates and paying every creditor his full debt, it shall be restored to the bankrupt.

2. Equally.

CHAPTER XXXII.

OF TITLE BY TESTAMENT AND ADMINISTRATION.

XI., XII. First, **as to the original of testaments and administrations.** [489] When property came to be vested in individuals by the right of occupancy, it became necessary for the peace of society that this occupancy should be continued, not only in the present possessor, but in those persons to whom he should think proper to transfer it, which introduced the doctrine and practice of alienations, gifts, and contracts. [490] But these precautions would be very short and imperfect if they were confined to the life only of the occupier, for then, upon his death, all his goods would again become common, and create an infinite variety of strife and confusion. The law of very many societies has therefore given to the proprietor a right of continuing his property after his death, in such persons as he shall name; and in defect of such appointment or nomination, or where no nomination is permitted, the law of every society has directed the goods to be vested in certain particular individuals, exclusive of all other persons. The former method of acquiring personal property, according to the express directions of the deceased, we call a **testament**; the latter, which is also according to the will of the deceased, not expressed, indeed, but presumed by the law, we call in England an **administration,** being the same which the civil lawyers term a succession *ab intestato,*[1] and which answers to the descent or inheritance of real estates.

Testaments are of very high antiquity. With us in England this power of bequeathing is coeval with the first rudiments of the law. [491] But we are not to imagine that this power of bequeathing extended originally to *all* a man's personal estate. On the contrary, Glanvil will inform us that by the common law, as it stood in the reign of Henry II., a man's goods were to be divided into three equal parts, of which one went to his heirs or lineal de-

1. From one dying without a will.

scendants, another to his wife, and the third was at his own disposal; or if he died without a wife, he might then dispose of one moiety, and the other went to his children. And so *e converso*,[2] if he had no children the wife was entitled to one moiety, and he might bequeath the other; but if he died without either wife or issue, the whole was at his own disposal. [492] The shares of the wife and children were called their **reasonable parts**, and the writ *de rationabili parte bonorum*[3] was given to recover them.

This continued to be the law of the land at the time of *Magna Carta*, and in the reign of King Edward III. this right of the wife and children was still held to be the universal or common law, though frequently pleaded as the local custom of Berks, Devon, and other counties; and Sir Henry Finch lays it down expressly in the reign of Charles I. to be the general law of the land. But this law is at present altered by imperceptible degrees, and **the deceased may now, by will, bequeath the whole of his goods and chattels**, though we cannot trace out when first this alteration began.

In case a person made no disposition of such of his goods as were testable, whether that were only part or the whole of them, he was and is said to die **intestate**; and in such cases it is said that by the old law the king was entitled to seize upon his goods as the *parens patriae*[4] and general trustee of the kingdom. [494] This prerogative the king continued to exercise for some time by his own ministers of justice, and probably in the county court, where matters of all kinds were determined. Afterwards the goods of intestates were given to the ordinary by the crown, and he might seize them and keep them without wasting, and also might give, aliene, or sell them at his will and dispose of the money *in pios usus*;[5] and if he did otherwise he broke the confidence which the law reposed in him. So that, properly, the whole interest and power which were granted to the ordinary were

2. On the contrary.

3. For a reasonable part of the goods.

4. Parent of the state.

5. In pious uses. The most pious use to which he could bestow them was usually to his own individual use.

only those of being the king's almoner within his diocese in trust to distribute the intestate's goods in charity to the poor, or in such superstitious uses as the mistaken zeal of the times had denominated pious. And as he had thus the disposition of intestates' effects, the probate of wills of course followed; for it was thought just and natural that the will of the deceased should be proved to the satisfaction of the prelate, whose right of distributing his chattels for the good of his soul was effectually superseded thereby. Thus the popish clergy took to themselves (under the name of the church and poor) the whole residue of the deceased's estate after the *partes rationabiles*,[6] or two thirds, of the wife and children were deducted, without paying even his lawful debts or other charges thereon. [495] For which reason it was enacted by **the statute of Westm. 2**, that the ordinary shall be bound to pay the debts of the intestate, so far as his goods will extend, in the same manner that executors were bound in case the deceased had left a will,— a use more truly pious than any *requiem* or mass for his soul. But though they were now made liable to the creditors of the intestate for their just and lawful demands, yet the *residuum*,[7] after payment of debts, remained still in their hands to be applied to whatever purposes the conscience of the ordinary should approve. The flagrant abuses of which power occasioned the legislature again to interpose, in order to prevent the ordinaries from keeping any longer the administration in their own hands or those of their immediate dependents; and, therefore, **the statute 31 Edw. III. c. 11, provides that, in case of intestacy, the ordinary**[8] **shall depute the nearest and most lawful friends of the deceased to administer his goods, which administrators are put upon the same footing with regard to suits and to accounting as executors appointed by will.** [496] This is the original of administrators as they at present stand, who are only the officers of the ordinary, appointed by him in pursuance of this statute, which singles out the *next and most lawful*

6. Reasonable parts.
7. Residue.
8. Probate jurisdiction in this country is variously vested in probate, county, surrogate, orphan's courts, etc. See the local statutes.

friend of the intestate, who is interpreted to be the **next of blood** that is under no legal disabilities. The **statute 21 Hen. VIII. c. 5**, enlarges a little more the power of the ecclesiastical judge, and **permits him to grant administration either to the widow or the next of kin, or to both of them at his own discretion, and where two or more persons are in the same degree of kindred, gives the ordinary his election to accept whichever he pleases.** Upon this footing stands the general law of administrations at this day.[9]

Secondly, **who may or may not make a testament,** or what persons are absolutely obliged by law to die intestate.[1] **Regularly, every person hath full power and liberty to make a will that is not under some special prohibition by law or custom,** which prohibitions are principally upon three accounts: for want of sufficient discretion, for want of sufficient liberty and free will, and on account of their criminal conduct. [497]

1. In the first species are to be reckoned **infants under the age of fourteen if males, and twelve if females.**[2] **Madmen,**

9. To whom the administration of an intestate's estate shall be granted now depends wholly upon local statutes. Schouler on Wills and Administration, 349, 351.

"The fundamental principle of both English and American enactments now in force on this subject is, that the right to administer whenever the deceased chose no executor, shall go according to the beneficial interest in the estate; a principle which may yield, however, to other considerations of sound policy and convenience. Schouler on Wills and Administration, 349. As to the right of a surviving husband or wife to administer, see Id., 349, 350. As to the rule between widow and kindred, see Id., 351, 352.

1. Besides ordinary last wills and testaments there are also in some states holographic and mystic wills. The former is wholly written and signed by the testator himself and needs no witnesses. They are lawful in the province of Manitoba, in Louisiana, Mississippi and perhaps other states. Schouler on Wills, 3, 4 and notes; La. Civ. Code, art. 1581.

A "mystic testament," consists in inclosing one's instruments of disposition in an envelope and sealing it in presence of witnesses. La. Civ. Code, arts. 1577-1580; Schouler on Wills, 3 and note.

Nuncupative wills permit the testator to make a testamentary disposition *in extremis* before a sufficient number of witnesses by whose oral testimony it is subsequently established. Schouler on Wills, 3.

2. The age of testamentary capacity is usually fixed by statute in the United States and in England at 21, though it is less than 21 in some states. Schouler on Wills, 21.

or otherwise *non compotes,* **idiots,** or natural fools, persons grown **childish** by reason of old age or distemper, such as have their senses besotted with **drunkenness** — all these are incapable by reason of mental disability to make any will so long as such disability lasts. To this class may be referred such persons as are *born* **deaf, blind, and dumb,** who, as they have always wanted the common inlets of understanding, are incapable of having *animum testandi,*[3] and their testaments are therefore void.[4]

2. **Such persons as are intestable for want of liberty or freedom of will** are, by the civil law, of various kinds, as prisoners, captives, and the like. But the law of England does not make such persons absolutely intestable, but only leaves it to the discretion of the court to judge upon the consideration of their particular circumstances of duress, whether or no such person could be supposed to have *liberum animum testandi.* And with regard to **feme-coverts,** with us a married woman is not only utterly incapable of devising *lands,* being excepted out of the statute of wills, 34 & 35 Hen. VIII. c. 5, but also she is incapable of making a testament of *chattels* without the license of her husband.[5] [498] Yet by her husband's license she may make a testament, and the husband, upon marriage, frequently covenants with her friends to allow her that license; but such license is more properly his assent, for unless it be given to the particular will in question it will not be a complete testament, even though the husband beforehand hath given her permission to make a will. Yet it shall be sufficient to repel

3. Testamentary capacity.

4. Deaf and dumb persons are not now deemed idiots. Brower v. Fisher, 4 John. Ch. 441; Ewell's Lead. Cases, 721-724. A lower degree of intellect is required to make a will than to make a contract. Converse v. Converse, 21 Vt. 168; Ewell's Lead. Cases, 652. To make a will the testator must have a sound and disposing mind and memory. In other words, he ought to be capable of understanding the nature of the business in which he is engaged, to have a recollection of the property he means to dispose of, of the persons who are the objects of his bounty and the manner in which it is to be distributed among them. Sloan v. Maxwell, 3 N. J. Eq. 563; Ewell's Lead. Cases, 643 *et seq.* and cases cited; Schouler on Wills, 16, 31.

5. Changed by statute to a greater or less extent in many of the United States. Schouler on Wills, 23, 27.

the husband from his general right of administering his wife's effects, and administration shall be granted to her appointee with such testamentary paper annexed. So that, in reality, the woman makes no will at all, but only something like a will, operating in the nature of an appointment, the execution of which the husband, by his bond, agreement, or covenant, is bound to allow. **The queen consort** is an exception to this general rule, for she may dispose of her chattels by will without the consent of her lord. And **any feme-covert may make her will of goods which are in her possession in auter droit**[6] as executrix or administratrix, for these can never be the property of the husband; and if she has any pin-money or separate maintenance, it is said she may dispose of her savings thereout by testament without the control of her husband. [499] But if a feme-sole makes her will, and afterwards marries, such subsequent marriage is esteemed a revocation in law, and entirely vacates the will.[7]

3. **Persons incapable of making testaments, on account of their criminal conduct,** are, in the first place, all **traitors and felons,** from the time of conviction, for their goods and chattels are no longer at their own disposal, but forfeited to the king. Neither can a **felo de se** make a will of goods and chattels, for they are forfeited by the act and manner of his death; but he may make a devise of his lands, for they are not subjected to any forfeiture. **Outlaws** also, though it be but for debt, are incapable of making a will so long as the outlawry subsists, for their goods and chattels are forfeited during that time. As for persons guilty of other crimes short of felony (as usurers, libellers, and others of a worse stamp), by the common law their testaments may be good.

Thirdly, **what are the nature and incidents of a testament? A testament is "the legal declaration of a man's intentions, which he wills to be performed after his death."** [500]

These testaments are divided into two sorts: **written** and **verbal,** or **nuncupative;** of which the former is committed to writing, the latter depends merely upon oral evidence, being declared by the testator *in extremis* before a sufficient number of witnesses, and afterwards reduced to writing. **A**

6. In another right.

7. Consult the local statutes.

codicil, *codicillus*, a little book or writing, **is a supplement to a will**, or an addition made by the testator, and annexed to and to be taken as part of a testament, being for its explanation or alteration, or to make some addition to, or else some subtraction from, the former dispositions of the testator. This may also be either written or nuncupative.

But as **nuncupative wills and codicils** (which were formerly more in use than at present, when the art of writing is become more universal) are liable to great impositions, and may occasion many perjuries, the **statute of frauds, 29 Car. II. c. 3, hath laid them under many restrictions, except when made by mariners at sea, and soldiers in actual service.**[8] As to all other persons it enacts: 1. That no written will shall be revoked or altered by a subsequent nuncupative one, except the same be in the lifetime of the testator reduced to writing and read over to him, and approved, and unless the same be proved to have been so done by the oaths of three witnesses at the least, who, by statute 4 & 5 Anne, c. 16, must be such as are admissible upon trials at common law. 2. That no nuncupative will shall in any wise be good where the estate bequeathed exceeds 30*l*, unless proved by three such witnesses present at the making thereof (the Roman law requiring seven), and unless they or some of them were specially required to bear witness thereto by the testator himself, and unless it was made in his last sickness, in his own habitation or dwelling-house, or where he had been previously resident ten days at the least, except he be surprised with sickness on a journey, or from home, and dies without returning to his dwelling. [501] 3. That no nuncupative will shall be proved by the witnesses after six months from the making, unless it were put in writing within six days. Nor shall it be proved till fourteen days after the death of the testator, nor till process hath first issued to call in the widow, or next of kin, to contest it if they think proper. Thus hath the legislature provided against any frauds in setting up nuncupative wills by so numerous a train of requisites, that the thing itself has fallen into disuse, and is hardly ever heard of but in the

8. See *ante*, note, and Stim. Am. St. Law, §§ 2700-2705.

only instance where favor ought to be shown to it, when the testator is surprised by sudden and violent sickness. The testamentary words must be spoken with an intent to bequeath, not any loose idle discourse in his illness, for he must require the by-standers to bear witness of such his intention; the will must be made at home, or among his family or friends, unless by unavoidable accidents; to prevent impositions from strangers, it must be in his *last* sickness, for it he recovers he may alter his dispositions, and has time to make a written will; it must not be proved at too long a distance from the testator's death, lest the words should escape the memory of the witnesses, nor yet too hastily and without notice, lest the family of the testator should be put in inconvenience or surprised.

As to written wills they need not any witness of their publication. I speak not here of devises of lands, which are quite of a different nature, being conveyances by statute, unknown to the feodal or common law, and not under the same jurisdiction as personal testaments. But a testament of chattels, written in the testator's own hand, though it has neither his name nor seal to it, nor witnesses present at its publication, is good, provided sufficient proof can be had that it is his handwriting.[9] And though written in another man's hand, and never signed by the testator, yet, if proved to be according to his instructions and approved by him, it hath been held a good testament of the personal estate. [502]

No testament is of any effect till after the death of the testator. And therefore if there be many testaments, the last overthrows all the former; but the republication of a former will revokes one of a later date and establishes the first again.

Hence it follows that **testaments may be avoided three ways: 1. If made by a person laboring under any of the incapacities before mentioned; 2. By making another testament of a later date;** and 3. **By cancelling or revoking it.**

9. In this country testaments of chattels usually require to be made with the same formalities as devises.

For though I make a last will and testament irrevocable in the strongest words, yet I am at liberty to revoke it, because my own act or words cannot alter the disposition of law so as to make that irrevocable which is in its own nature revocable. It hath also been held that, without an express revocation, if a man who hath made his will afterwards marries and hath a child, this is a presumptive or **implied revocation** of his former will, which he made in his state of celibacy.[1] The Romans were also wont to set aside testaments as being *inofficiosa,* deficient in natural duty, if they disinherited or totally passed by (without assigning a true and sufficient reason) any of the children of the testator. [503] But if the child had any legacy, though ever so small, it was a proof that the testator had not lost his memory or his reason, which otherwise the law presumed, but was then supposed to have acted thus for some substantial cause, and in such case no *querela inofficiosi testamenti*[2] was allowed. Hence probably has arisen that groundless **vulgar error of the necessity of leaving the heir a shilling,** or some other express legacy, in order to disinherit him effectually; whereas the law of England makes no such constrained suppositions of forgetfulness or insanity, and therefore, though the heir or next of kin be totally omitted, it admits no *querela inofficiosi* to set aside such a testament.[3]

Fourthly, **what is an executor, and what an administrator, and how they are both to be appointed.**

An executor is he to whom another man commits by will the execution of that his last will and testament. And all persons are capable of being executors that are capable of making wills, and many others besides, as feme-coverts and infants; nay, even infants unborn, or *in ventre sa mere* may be made executors. But no infant can act as such till the age of seventeen years, till which time administration must

1. See *ante,* note.

2. Compaint of an undutiful will.

3. This is the general law of this country when not changed by statute. In some states, however, children not provided for in the will take the same share as if the testator had died intestate. See local statutes; Stim. Am. Stat. Law, §§ 2842-2843.

be granted to some other, *durante minore aetate;*[4] in like manner as it may be granted, *durante absentia,*[5] or *pendente lite,*[6] when the executor is out of the realm, or when a suit is commenced in the ecclesiastical court touching the validity of the will. This appointment of an executor is essential to the making of a will, and it may be performed either by express words, or such as strongly imply the same. But if the testator makes an incomplete will without naming any executors, or if he names incapable persons, or if the executors named refuse to act, — in any of these cases the ordinary must grant **administration cum testamento annexo**[7] to some other person, and then the duty of the administrator, as also when he is constituted only *durante minore aetate,* &c., of another, is very little different from that of an executor. [504]

But if the deceased died wholly intestate, without making either will or executors, then general letters of administration must be granted by the ordinary to such administrator as the statutes of Edward III. and Henry VIII., before mentioned, direct. In consequence of which we may observe: 1. **That the ordinary is compellable to grant administration of the goods and chattels of the wife to the husband, or his representatives, and of the husband's effects to the widow, or next of kin, but he may grant it to either or both at his discretion.** 2. **That among the kindred, those are to be preferred that are the nearest in degree to the intestate, but of persons in equal degree the ordinary may take which he pleases.** 3. **That this nearness or propinquity of degree shall be reckoned according to the computation of the civilians,**[8] and not of the canonists, which the law of England adopts in the descent of real estates, because in the civil computation the intestate himself is the *ter-*

4. During minority.

5. During absence.

6. During litigation.

7. Administration with the will annexed.

His functions are, in general, those of an executor. Schouler on Wills and Admin., 365, 488. As to who is preferred in the appointment, see Id., 365.

8. This subject is regulated by statute in the several states, with the English statute as a general model. See Schouler on Wills and Admin., 351, and local statutes.

minus, a quo[9] the several degrees are numbered, and not the common ancestor, according to the rule of the canonists. And, therefore, in the first place, the children, or on failure of children the parents, of the deceased are entitled to the administration, — both which are indeed in the first degree, but with us the children are allowed the preference. [505] Then follow brothers, grandfathers, uncles, or nephews, and the females of each class respectively, and lastly, cousins. 4. **The half blood is admitted to the administration as well as the whole,** for they are of the kindred of the intestate and only excluded from inheritances of land upon feodal reasons. 5. **If none of the kindred will take out administration, a creditor may by custom do it.** 6. **If the executor refuses or dies intestate, the administration may be granted to the residuary legatee, in exclusion of the next of kin.** 7. **And lastly, the ordinary may, in defect of all these, commit administration, as he might have done before the statute of Edward III., to such discreet person as he approves of; or may grant him letters ad colligendum bona defuncti,**[1] **which neither makes him executor nor administrator,** his only business being to keep the goods in his safe custody, and to do other acts for the benefit of such as are entitled to the property of the deceased.

If a bastard, who has no kindred, being *nullius filius*,[2] or any one else that has no kindred dies intestate, and without wife or child, it hath formerly been held that the ordinary might seize his goods and dispose of them *in pios usus*. But the usual course now is for some one to procure letters-patent or other authority from the king, and then the ordinary of course grants administration to such appointee of the crown. [506]

The interest vested in the executor by the will of the deceased may be continued and kept alive by the will of the same executor, so that the executor of A's executor is to all intents and purposes the executor and representative of A himself;[3] but the executor of A's administrator, or the

9. The terminal from which.

1. To collect the goods of the deceased.

2. No one's son.

3. Controlled by local statutes, which see. See Schouler on Wills and Admin., 365 *et seq.*

administrator of A's executor, is not the representative of A. For the power of an executor is founded upon the special confidence and actual appointment of the deceased, and such executor is therefore allowed to transmit that power to another in whom he has equal confidence; but the administrator of A is merely the officer of the ordinary, prescribed to him by act of parliament, in whom the deceased has reposed no trust at all, and, therefore, on the death of that officer it results back to the ordinary to appoint another. And with regard to the administrator of A's executor, he has clearly no privity or relation to A, being only commissioned to administer the effects of the intestate executor, and not of the original testator. Wherefore, in both these cases, and whenever the course of representation from executor to executor is interrupted by any one administration, it is necessary for the ordinary to commit administration afresh *of the goods* of the deceased *not* administred by the former executor or administrator. And this **administrator de bonis non**, is the only legal representative of the deceased in matters of personal property. But he may, as well as an original administrator, have only a *limited* or *special* administration committed to his care, viz., of certain specific effects, such as a term of years and the like, the rest being committed to others.

Fifthly and lastly, I proceed **to inquire into some few of the principal points of the office and duty of executors and administrators.** These in general are very much the same in both executors and administrators, excepting, first, that the executor is bound to perform a will, which an administrator is not, unless where a testament is annexed to his administration, and then he differs still less from an executor; and, secondly, that an executor may do many acts before he proves the will, but an administrator may do nothing till letters of administration are issued, for the former derives his power from the will and not from the probate, the latter owes his entirely to the appointment of the ordinary. If a stranger takes upon him to act as executor without any just authority, as by intermeddling with the goods of the deceased, and many other transac-

tions, he is called in law an **executor of his own wrong** (*de son tort*), and is liable to all the trouble of an executorship without any of the profits or advantages;[4] but merely doing acts of necessity or humanity, as locking up the goods, or burying the corpse of the deceased, will not amount to such an intermeddling as will charge a man as executor of his own wrong.[5] Such a one cannot bring an action himself in right of the deceased, but actions may be brought against him. And in all actions by creditors against such an officious intruder, he shall be named an executor generally; for the most obvious conclusion which strangers can form from his conduct is, that he hath a will of the deceased, wherein he is named executor, but hath not yet taken probate thereof. He is chargeable with the debts of the deceased, so far as assets come to his hands, and, as against creditors in general, shall be allowed all payments made to any other creditor in the same or a superior degree, himself only excepted. [508] And though, as against the rightful executor or administrator, he cannot plead such payment, yet it shall be allowed him in mitigation of damages; unless, perhaps, upon a deficiency of assets, whereby the rightful executor may be prevented from satisfying his own debt. But let us now see what are **the power and duty of a rightful executor or administrator.**[6]

1. **He must bury the deceased** in a manner suitable to the estate which he leaves behind him. Necessary funeral expenses are allowed previous to all other debts and charges; but if the executor or administrator be extravagant, it is a species of *devestation*, or waste of the substance of the deceased, and shall only be prejudicial to himself, and not to the creditors or legatees of the deceased.

2. **The executor or the administrator durante minore ætate, or durante absentia, or cum testamento annexo, must prove the will of the deceased**, which is done either in *common form*, which is only upon his own oath before the ordinary or his surrogate, or *per testes*, in more solemn form

4. See, generally, Schouler on Wills and Admin., ch. 8.

5. See Schouler on Wills and Admin., 401.

6. See, generally, Schouler on Wills and Admin., Part 4.

of law, in case the validity of the will be disputed. When the will is so proved the original must be deposited in the registry of the ordinary, and a copy thereof in parchment is made out under the seal of the ordinary, and delivered to the executor or administrator, together with a certificate of its having been proved before him; all which together is usually styled the **probate.**[7] In defect of any will, the person entitled to be administrator must also at this period take out letters of administration under the seal of the ordinary, whereby an executorial power to collect and administer, that is, dispose of the goods of the deceased, is vested in him; and he must, by statute 22 & 23 Car. II. c. 10, enter into a bond, with sureties, faithfully to execute his trust.

3. **The executor or administrator is to make an inventory** of all the goods and chattels, whether in possession or action, of the deceased, which he is to deliver in to the ordinary upon oath, if thereunto lawfully required. [510]

4. **He is to collect all the goods and chattels so inventoried,** and to that end he has very large powers and interests conferred on him by law, being the representative of the deceased, and having the same property in his goods as the principal had when living, and the same remedies to recover them. And if there be two or more executors, a sale or release by one of them shall be good against all the rest; but in case of administrators it is otherwise.[8] Whatever is so recovered that is of a salable nature and may be converted into ready money, is called **assets** in the hands of the executor or administrator; that is, sufficient or enough (from the French *assez*) to make him chargeable to a creditor or legatee so far as such goods and chattels extend. [511] Whatever assets so come to his hands he may convert into ready money, to answer the demands that may be made upon him, which is the next thing to be considered; for,

7. The practice in probate courts, by whatever name called, has a general similarity; but varies in detail. The method of contest also differs. In Illinois, for example, the trial of a contested will is by a bill in chancery in the circuit court, not in the county or probate court.

8. Not so in the United States.

5. The executor or administrator must pay the debts of the deceased. In payment of debts he must observe the rules of priority, otherwise, on deficiency of assets, if he pays those of a lower degree first, he must answer those of a higher out of his own estate. And, first, he may pay all funeral charges, and the expense of proving the will, and the like. Secondly, debts due to the king on record or specialty. Thirdly, such debts as are by particular statutes to be preferred to all others, as the forfeitures for not burying in woolen, money due upon poor rates, for letters to the post-office, and some others. Fourthly, debts of record; as judgments (docketed according to the statute 4 & 5 W. & M. c. 20), statutes, and recognizances. Fifthly, debts due on special contracts, as for rent (for which the lessor has often a better remedy in his own hands by distraining), or upon bonds, covenants, and the like, under seal. Lastly, debts on simple contracts, viz., upon notes unsealed, and verbal promises.[9] Among these simple contracts, servants' wages are by some with reason preferred to any other; and so stood the ancient law according to Bracton and Fleta, who reckon among the first debts to be paid, *servita servientium et stipendia famulorum.* Among debts of equal degree, the executor or administrator is allowed to pay himself first, by retaining in his hands so much as his debt amounts to.

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9. In England specialty and simple contract creditors are now placed on the same footing by statute of 32 & 33 Vict., ch. 46. The priority of judgment creditors is, however, still retained. Schouler on Wills and Admin., 502; Wms. Exrs. preface, 1011.

The general tendency of legislation in the United States is to place specialty and simple contract debts on the same plane. Schouler on Wills and Admin., 502 note; 2 Kent. Com. 418, 419. In Illinois, for example, demands against the estate of any testator or intestate are, after allowance, paid in the following order: (1) Funeral expenses and necessary cost of administration.

(2) The widow's award, if there is a widow; or children's, if there are children and no widow.

(3) Expenses attending the last illness, not including physician's bill, and demands due common laborers or household servants of deceased for labor.

(4) Debts due the common school or township funds.

(5) The physician's bill in the last illness of deceased.

(6) Trust funds received by deceased and not accounted for.

(7) All other debts and demands of whatever kind without regard to quality or dignity. See Ill. Rev. Stat., ch. 3, sec. 70.

But an executor of his own wrong is not allowed to retain; for that would tend to encourage creditors to strive who should first take possession of the goods of the deceased, and would besides be taking advantage of his own wrong, which is contrary to the rule of law. If a creditor constitutes his debtor his executor, this is a release or discharge of the debt, whether the executor acts or no, provided there be assets sufficient to pay the testator's debts; for though this discharge of the debt shall take place of all legacies, yet it were unfair to defraud the testator's creditors of their just debts by a release which is absolutely voluntary. [512] Also, if no suit is commenced against him [and decree of payment rendered], the executor may pay any one creditor in equal degree his whole debt, though he has nothing left for the rest; for without a suit commenced the executor has no legal notice of the debt.

6. **When the debts are all discharged, the legacies claim the next regard,**[2] which are to be paid by the executor so far as his assets will extend; but he may not give himself the preference herein, as in the case of debts.

A legacy is a bequest or gift of goods and chattels by testament, and the person to whom it was given is styled the legatee, which every person is capable of being, unless particularly disabled by the common law or statutes, as traitors, papists, and some others. This bequest transfers an inchoate property to the legatee, but **the legacy is not perfect without the assent of the executor;**[3] for if I have a

1. As to proof and collection of claims the local statutes must be consulted and followed. See Schouler on Wills and Admin., 502.

It is not enough that a suit has been *commenced* (Sorrell v. Carpenter, 2 P. Wms. 483), there must have been a decree for payment of debts, or an executor will be at liberty to give a preference, amongst creditors of equal degree (Maltby v. Russell, 2 Sim. & Stu. 228; Perry v. Philips, 10 Ves. 39. And see *ante*, p. *511, note.

2. All valid legal claims take precedence over legacies, regardless of the testator's wishes. Schouler on Wills, 530.

3. Schouler on Wills, 536 and cases cited. The assent of the executor is equally necessary whether a legacy be specific or merely pecuniary (Flanders v. Clarke, 3 Atk. 510; Abney v. Miller, 2 Atk. 598); a court of equity, indeed, will compel the executor to deliver the specific article devised (Northey v. Northey, 2 Atk. 77); but, as a general rule, no action at law can be maintained for a legacy (Deeks

general or *pecuniary* legacy of 100*l.*, or a *specific* one of a piece of plate, I cannot in either case take it without the consent of the executor. For in him all the chattels are vested, and it is his business first of all to see whether there is a sufficient fund left to pay the debts of the testator, — the rule of equity being that a man must be just before he is permitted to be generous. **And in case of a deficiency of assets, all the general legacies must abate proportionably in order to pay the debts, but a specific legacy (of a piece of plate, a horse, or the like) is not to abate at all, or allow anything by way of abatement, unless there be not sufficient without it.** [513] Upon the same principle, if the legatees had been paid their legacies, they are afterwards bound to refund a ratable part, in case debts come in more than sufficient to exhaust the *residuum* after the legacies paid.[4]

If a legatee dies before the testator, the legacy is a lost or **lapsed legacy,** and shall sink into the *residuum.* And if a *contingent* legacy be left to any one, as *when* he attains, or *if* he attains, the age of twenty-one, and he dies before that time, it is a lapsed legacy.[5] But a legacy to one *to be paid* when he attains the age of twenty-one years, is a **vested legacy,** — an interest which commences *in praesenti,* although it be *solvendum in futuro;*[6] and if the legatee dies before that age, his representative shall receive it out of

v. Strutt, 5 T. R. 692), or for a distributive share under an intestacy. (Jones v. Tanner, 7 Barn. & Cress 544.) It was held, however, in Doe v. Guy (3 East, 123), to be clear, from all the authorities, that the interest in any specific thing bequeathed vest, at law, in the legatee, upon the assent of the executor; and, therefore, that whenever an executor has given assent (expressly, and not merely by implication), to a specific legacy, should he subsequently withhold it, the legatee may maintain an action at law for the recovery of the interest so vested in him. If a deficiency of assets to pay creditors were afterwards to appear, the court of chancery would have power to interfere, and make the legatee refund, in the proportion required.

4. See, generally, as to the payment and satisfaction of legacies, Schouler on Wills, Part 5, ch. 4.

5. There may also be an *ademption* of a legacy, which signifies its revocation aside from a revocation of the will itself. This may happen by some act of the testator which disposes of or destroys the identity of the article bequeathed. See Schouler on Wills, 527.

6. To be paid in the future.

the testator's personal estate at the same time that it would have become payable in case the legatee had lived. This distinction is borrowed from the civil law, and its adoption in our courts is not so much owing to its intrinsic equity as to its having been before adopted by the ecclesiastical courts. For since the chancery has a concurrent jurisdiction with them in regard to the recovery of legacies, it was reasonable that there should be a conformity in their determinations. But if such legacies be charged upon a real estate, in both cases they shall lapse for the benefit of the heir, for with regard to devises affecting lands the ecclesiastical court hath no concurrent jurisdiction. And in case of a vested legacy due immediately, and charged on land or money in the funds, which yield an immediate profit, interest shall be payable thereon from the testator's death; but if charged only on the personal estate, which cannot be immediately got in, it shall carry interest only from the end of the year after the death of the testator.[7] [514]

Besides these formal legacies, contained in a man's will and testament, there is also permitted another death-bed disposition of property, which is called a **donation causa mortis.**[8] And that is when a person in his last sickness,

7. With us interest is generally allowable after the expiration of one year after the testator's death. Schouler on Wills, 533.

8. See *ante*, note. A *donatio mortis causa* has many of the properties of a legacy; it is liable to debts, and is dependent on survivorship. Tate v. Hilbert, 2 Ves. Jr. 120; Jones v. Selby, Prec. in Cha. 303; Miller v. Miller, 3 P. Wms. 357. It is not a present absolute gift, vesting immediately, but a revocable and conditional one, of which the enjoyment is postponed, till after the giver's death. Walter v. Hodge, 2 Swanst. 98. On the other hand, though liable to be defeasanced, it must, subject to such power of revocation, be a complete gift *inter vivos*, and therefore requires no probate (Ward v. Turner, 2 Ves. Sr. 435; Ashton v. Dawson, Sel. Ca. in Cha. 14); though a question has been made whether, as such a gift is only to take effect in case of the donor's death, it ought not to be held so far testamentary as to be liable to legacy duty. Woodbridge v. Spooner, 3 Barn. & Ald. 236.

A *donatio mortis causa* plainly differs from a legacy in this particular —the subject of gift must in the former case be delivered *by the donor;* in the latter case, *by his representative.* Walter v. Hodge, 2 Swanst. 98. So, the distinction between a nuncupative will, and a *donatio mortis causa* is, that the bounty given in the first-named mode is to be re-

apprehending his dissolution near, delivers or causes to be delivered to another the possession of any personal goods,— under which have been included bonds and bills drawn by the deceased upon his banker, — to keep in case of his decease. This gift, if the donor dies, needs not the assent of his executor; yet it shall not prevail against creditors, and is accompanied with this implied trust, that if the donor lives, the property thereof shall revert to himself, being only given in contemplation of death, or *mortis causa*.

7. **When all the debts and particular legacies are discharged, the surplus or residuum must be paid to the residuary legatee, if any be appointed by the will**; and if there be none, although where the executor has no legacy at all the *residuum* shall in general be his own,[9] yet wherever there is sufficient on the face of a will, — by means of a competent legacy or otherwise, — to imply that the testator intended his executor should *not* have the residue, the undevised surplus of the estate shall go to the next of kin, the executor then standing upon exactly the same footing as an administrator, concerning whom, indeed, there formerly was much debate whether or no he could be compelled to make any distribution of the intestate's estate. [515] For though, after the administration was taken in effect from the ordinary and transferred to the relations of the deceased, the spiritual court endeavored to compel a distribution and took bonds of the administrator for that purpose, they were prohibited by the temporal courts, and the bonds declared void at law. And the right of the husband not only to administer, but also to enjoy exclusively the effects of his deceased wife, depends still on this doctrine of the common law, the statute of frauds declaring only that the statute of distribution does not extend to this case. But now these controversies are quite at an end, for by **the statute 22 & 23 Car. II. c. 10, explained by 29 Car. II.**

ceived from the executor; but in the latter case may be held against him, and requires no assent on his part, the delivery having been completed by the donor himself. Duffield v. Elwes, 1 Sim. & Stu. 244; Ward v. Turner, 2 Ves. Sr. 443.

9. Not so with us. See local statutes which generally give such residue to the next of kin. Schouler on Wills and Admin., 542.

c. 30, it is enacted that the surplusage of intestates' estates (except of femes-covert, which are left as at common law) shall, after the expiration of one full year from the death of the intestate be distributed in the following manner: One third shall go to the widow of the intestate, and the residue in equal proportions to his children, or, if dead, to their representatives, that is, their lineal descendants. If there are no children or legal representatives subsisting, then a moiety shall go to the widow and a moiety to the next of kindred in equal degree and their representatives; if no widow, the whole shall go to the children; if neither widow nor children, the whole shall be distributed among the next of kin in equal degree and their representatives; but no representatives are admitted among collaterals farther than the children of the intestate's brothers and sisters.[1] The next of kindred here referred to are to be investigated by the same rules of consanguinity as those who are entitled to letters of administration, of whom we have sufficiently spoken. And therefore by this statute the mother as well as the father succeeded to all the personal effects of their children, who died intestate and without wife or issue, in exclusion of the other sons and daughters, the brothers and sisters of the deceased. [516] And so the law still remains with respect to the father; but by statute I Jac. II. c. 17, if the father be dead and any of the children die intestate without wife or issue in the lifetime of the mother, she and each of the remaining children or their representatives shall divide his effects in equal portions.

So, likewise, there is another part of the statute of distributions where directions are given that no child of the intestate, — except his heir at law, — on whom he settled in his lifetime any estate in lands or pecuniary portion equal to the distributive shares of the other children, shall have any part of the surplusage with their brothers and

1. In this country real and personal estate, though they may pursue different channels, usually vest in the same persons, the next of kin. Our statutes of distribution, though differing in details, are usually modeled after the English statute of distributions. See Schouler on Wills and Admin., 543; 2 Kent. Com. 426 and notes. Consult the local statutes.

sisters; but if the estates so given them by way of **advancement** are not quite equivalent to the other shares, the children so advanced shall now have so much as will make them equal.[2] [517] It may not be amiss to observe that with regard to goods and chattels, this is part of the ancient custom of London, of the province of York, and of our sister kingdom of Scotland; and with regard to lands descending in coparcenary, that it hath always been and still is the common law of England under the name of **hotchpot.**

The doctrine and limits of representation laid down in the statute of distributions seem to have been principally borrowed from the civil law, whereby it will sometimes happen that personal estates are divided *per capita*[3] and sometimes *per stirpes*,[4] whereas the common law knows no other rule of succession but that *per stirpes* only. **They are divided per capita, to every man an equal share, when all the claimants claim in their own rights, as in equal degree of kindred, and not jure repræsentationis, in the right of another person.** As if the next of kin be the intestate's three brothers, A, B, and C, here his effects are divided into three equal portions and distributed *per capita* one to each; but if one of these brothers, A, had been dead, leaving three children, and another, B, leaving two, then the distribution must have been *per stirpes*, viz. one third to A's three children, another third to B's two children, and the remaining third to C, the surviving brother. Yet if C had also been dead without issue, then A's and B's five children, being all in equal degree to the intestate, would take in their own rights *per capita*, viz. each of them one fifth part.[5]

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2. Schouler on Wills and Administration, 545; Wms. Exrs., 1485, 1498.

3. Per head.

4. By trunk or root, i. e., by right of representation.

5. Consult the local statutes.

BOOK THE THIRD.

OF PRIVATE WRONGS.

CHAPTER I.

OF THE REDRESS OF PRIVATE WRONGS BY THE MERE ACT OF THE PARTIES.

A wrong is a privation of right. [2] Wrongs are divisible into two sorts or species: **private wrongs** and **public wrongs.** The former are an infringement or privation of the private or civil rights belonging to individuals considered as individuals, and are thereupon frequently termed *civil injuries;* the latter are a breach and violation of public rights and duties which affect the whole community considered as a community, and are distinguished by the harsher appellation of *crimes* and *misdemeanors.*

The remedy for private wrongs is *principally* to be sought by application to the courts of justice, that is, by civil suit or action. [3] But as there are certain injuries of such a nature that some of them furnish and others require a more speedy remedy than can be had in the ordinary forms of justice, there is allowed in those cases an extrajudicial or eccentrical kind of remedy, of which I shall first of all treat before I consider the several remedies by suit; and to that end shall distribute the redress of private wrongs into three several species: first, that which is obtained by the *mere act* of the *parties* themselves; secondly, that which is effected by the *mere act* and operation of *law;* and thirdly, that which arises from *suit* or *action* in courts, which consists in a conjunction of the other two, the act of the parties co-operating with the act of law.

And *first*, **of that redress of private injuries which is obtained by the mere act of the parties.** This is of two

sorts: first, that which arises from the act of the injured party only; and secondly, that which arises from the joint act of all the parties together; both which I shall consider in their order.

Of the first sort, or that which arises from the sole act of the injured party, is,

I. **The defence of one's self, or the mutual and reciprocal defense of such as stand in the relations of husband and wife, parent and child, master and servant.** In these cases, if the party himself, or *any* of these his relations, be forcibly attacked in his person or property, it is lawful for him to repel force by force, and the breach of the peace which happens is chargeable upon him only who began the affray. In the English law self-defence is held an excuse for breaches of the peace, nay, even for homicide itself; but care must be taken that the resistance does not exceed the bounds of mere defence and prevention, for then the defender would himself become an aggressor.[1] [4]

II. **Recaption, or reprisal,** is another species of remedy by the mere act of the party injured. This happens when any one hath deprived another of his property in goods or chattels personal, or wrongfully detains one's wife, child, or servant; in which case the owner of the goods and the husband, parent, or master may lawfully claim and retake them wherever he happens to find them, so it be not in a riotous manner or attended with a breach of the peace.[2] If, for instance, my horse is taken away, and I find him in a common, a fair, or a public inn, I may lawfully seize him to my own use; but I cannot justify breaking open a private stable or entering on the grounds of a third person to take him, except he be feloniously stolen, but must have recourse to an action at law. [5]

III. Thirdly, a remedy of the same kind for injuries to *real* property is by **entry on lands and tenements,** when another person without any right has taken possession thereof. This depends in some measure on like reasons

1. Cooley on Torts (Students' Ed.), 153-158 and cases cited; Hale on Torts, 91 and cases cited.

2. Cooley on Torts (Students' Ed.), 112.

with the former; and like that, too, must be peaceable and without force.[3]

IV. **The abatement or removal of nuisances.** Whatsoever unlawfully annoys or doth damage to another is a nuisance, and such nuisance may be abated, that is, taken away or removed, by the party aggrieved thereby, so as he commits no riot in the doing of it.[4] If a house or wall is erected so near to mine that it stops my ancient lights [the doctrine of ancient lights has not been adopted in this country], which is a *private* nuisance, I may enter my neighbor's land and peaceably pull it down. Of if a new gate be erected across the public highway, which is a *common* nuisance, any of the king's subjects passing that way may cut it down and destroy it.

V. A fifth case is that of **distraining cattle or goods for non-payment of rent or other duties; or distraining another's cattle** *damage-feasant*, that is, doing damage, or trespassing, upon his land.[5] [6]

1. **A distress, districtio, is the taking a personal chattel out of the possession of the wrongdoer into the custody of the party injured, to procure a satisfaction for the wrong committed.** (1.) The most usual injury for which a distress may be taken is that of non-payment of rent.

(2.) For neglecting to do suit to the lord's court, or other certain personal service the lord may distrain of common right. [7] (3.) For amercements in a court-leet a distress may be had of common right, but not for amercements in a court-baron, without a special prescription to warrant it.

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3. Cooley on Torts (Students' Ed.), 119.

4. If it is a private nuisance, he only may abate it who is injured by its continuance; if it is a public nuisance he only may abate it who suffers a special grievance not felt by the public in general. Cooley on Torts (Students' Ed.), 108.

5. See, as to the common law rules as to distress for rent, the leading case of Simpson v. Hartopp, Willes, 512; 1 Smith's Lead. Cases, *526 *et seq.* and notes; 1 Bouvier Law Dict. (11th Ed.), Distress, pp. 433-437; Cooley on Torts (Students' Ed.), 120; Taylor on Landlord and Tenant, §§ 556 *et seq.* and notes.

Distress of cattle damage-feasant is a common law right, regulated by statute in this country. Cooley on Torts (Students' Ed.), 119 and cases cited.

(4.) Another injury for which distresses may be taken is where a man finds beasts of a stranger wandering in his grounds *damage-feasant*, that is, doing him hurt or damage by treading down his grass or the like, in which case the owner of the soil may distrain them till satisfaction be made him for the injury he has thereby sustained. (5.) Lastly, for several duties and penalties inflicted by special acts of parliament (as for assessments made by commissioners of sewers or for the relief of the poor) remedy by distress and sale is given.

2. **As to the things which may be distrained**, or taken in distress, we may lay it down as a general rule that **all chattels personal are liable to be distrained, unless particularly protected or exempted.** Instead, therefore, of mentioning what things are distrainable, it will be easier to recount those which are not so, with the reason of their particular exemptions. And (1.) **Such things wherein no man can have an absolute and valuable property** (as dogs, cats, rabbits, and all **animals ferae naturae**) cannot be distrained. [8] Yet if deer (which are *ferae naturae*)[6] are kept in a private inclosure for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent. (2.) **Whatever is in the personal use or occupation** of any man is for the time privileged and protected from any distress, as an axe with which a man is cutting wood, or a horse while a man is riding him. But horses drawing a cart may (cart and all) be distrained for rent-arrere; and also, if a horse, though a man be riding him, be taken *damage-feasant*,[7] or trespassing in another's grounds, the horse (notwithstanding his rider) may be distrained and led away to the pound. [3.] **Valuable things in the way of trade** shall not be liable to distress. As a horse standing in a smith's shop to be shoed, or in a common inn; or cloth at a tailor's house; or corn sent to a mill or a market. For all these are protected and privileged for the benefit of trade, and are supposed in common presumption not to belong to the owner of the house, but to his customer.

6. Wild by nature.

7. Doing damage.

But, generally speaking, whatever goods and chattels the landlord finds upon the premises, whether they in fact belong to the tenant or a stranger, are distrainable by him for rent. With regard to a stranger's beasts which are found on the tenant's land, the following distinctions are however taken. If they are put in by consent of the owner of the beasts, they are distrainable immediately afterwards for rent-arrere by the landlord. So also if the stranger's cattle break the fences, and commit a trespass by coming on the land, they are distrainable immediately by the lessor for his tenant's rent, as a punishment to the owner of the beasts for the wrong committed through his negligence. But if the lands were not sufficiently fenced so as to keep out cattle, the landlord cannot distrain them till they have been *levant* and *couchant* (*levantes et cubantes*) on the land; that is, have been long enough there to have lain down and rose up to feed, which in general is held to be one night at least; and then the law presumes that the owner may have notice whether his cattle have strayed, and it is his own negligence not to have taken them away. [9] Yet, if the lessor of his tenant were bound to repair the fences and did not, and thereby the cattle escaped into their grounds without the negligence or default of the owner, in this case, though the cattle may have been *levant* and *couchant*, yet they are not distrainable for rent till actual notice is given to the owner that they are there and he neglects to remove them; for the law will not suffer the landlord to take advantage of his own or his tenant's wrong. (4.) There are also other things privileged by the ancient common law, as **a man's tools and utensils of his trade**, the axe of a carpenter, the books of a scholar, and the like, which are said to be privileged for the sake of the public, because the taking them away would disable the owner from serving the commonwealth in his station. So **beasts of the plough**, *averia carucae*, and sheep are privileged from distresses at common law; while dead goods or other sort of beasts, which Bracton calls *catalla otiosa*, may be distrained. But as beasts of the plough may be taken in execution for debt, so they may be for distress by statute, which partake of

the nature of executions. (5.) **Nothing shall be distrained for rent which may not be rendered again in as good plight as when it was distrained**; for which reason milk, fruit, and the like cannot be distrained, a distress at common law being only in the nature of pledge or security, to be restored in the same plight when the debt is paid. [10] So, anciently, sheaves or shocks of corn could not be distrained, because some damage must needs accrue in their removal; but a cart loaded with corn might, as that could be safely restored. But now by statute 2 W. & M. c. 5, corn in sheaves or cocks or loose in the straw, or hay in barns or ricks, or otherwise, may be distrained as well as other chattels. (6.) Lastly, **things fixed to the freehold may not be distrained**; and caldrons, windows, doors, and chimney-pieces, for they savor of the realty. For this reason, also, corn growing could not be distrained till the statute 11 Geo. II. c. 19, empowered landlords to distrain corn, grass, or other products of the earth, and to cut and gather them when ripe.

3. **How distresses may be taken, disposed of, or avoided.** Formerly, distresses were looked upon in no other light than as **a mere pledge** or security for payment of rent or other duties, or satisfaction for damage done. And so the law still continues with regard to distresses of beasts taken *damage-feasant,* and for other causes not altered by act of parliament, over which the distrainor has no other power than to retain them till satisfaction is made.

In pointing out the methods of distraining, I shall in general suppose the distress to be made for rent, and remark where necessary the differences between such distress and one taken for other causes.

In the first place, **all distresses must be made by day, unless in the case of damage-feasant,**— an exception being there allowed lest the bests should escape before they are taken. [11] And when a person intends to make a distress he must, by himself or his bailiff, enter on the demised premises, formerly **during the continuance of the lease**; but now [by statute], if the tenant holds over, the landlord may distrain within six months after the determination of the

lease, provided his own title or interest, as well as the tenant's possession, continue at the time of the distress. If the lessor does not find sufficient distress **on the premises,** formerly he could resort nowhere else. But now [by statute] the landlord may distrain any goods of his tenant, carried off the premises clandestinely, wherever he finds them within thirty days after, unless they have been *bona fide* sold for valuable consideration. The landlord may also distrain the beasts of his tenant, feeding upon any commons or wastes, appendant or appurtenant to the demised premises. **The landlord might not formerly break open a house to make a distress,** for that is a breach of the peace. But when he was in the house, it was held that he might break open an inner door; and now [by statute] he may, by the assistance of the peace-officer of the parish, break open in the daytime any place whither the goods have been fraudulently removed and locked up to prevent a distress, oath being first made, in case it be a dwelling-house, of a reasonable ground to suspect that such goods are concealed therein.

Where a man is entitled to distrain for an entire duty, he ought to distrain for the whole at once, and not for part at one time and part at another. But if he distrains for the whole and there is not sufficient on the premises, or he happens to mistake in the value of the thing distrained, and so takes an insufficient distress, he may take a second distress to complete his remedy. [12]

Distresses must be proportioned to the thing distrained for. By the statute of Marlbridge, 52 Hen. III. c. 4, if any man takes a great or unreasonable distress for rent-arrere, he shall be heavily amerced for the same. As if the landlord distrains two oxen for twelve-pence rent, the taking of *both* is an unreasonable distress; but if there were no other distress nearer the value to be found, he might reasonably have distrained *one* of them; but for homage, fealty, or suit and service, as also for parliamentary wages, it is said that no distress can be excessive. For as these distresses cannot be sold, the owner upon making satisfaction may have his chattels again. The remedy for excessive dis-

tresses is by a special action on the statute of Marlbridge, for an action of trespass is not maintainable upon this account, it being no injury at the common law.

When the distress is thus taken, the next consideration is the disposal of it. For which purpose **the things distrained must in the first place be carried to some pound, and there impounded by the taker.** But in their way thither they may be *rescued* by the owner, in case the distress was taken without cause, or contrary to law, as if no rent be due; if they were taken upon the highway, or the like: in these cases the tenant may lawfully make rescue. But if they be once impounded, even though taken without any cause, the owner may not break the pound and take them out, for they are then in the custody of the law.

A pound (*parcus*, which signifies any inclosure) is either pound-*overt*, that is open overhead, or pound-*covert*, that is close. By the statute 1 & 2 P. & M. c. 12, no distress of cattle can be driven out of the hundred where it is taken, unless to a pound-overt within the same shire, and within three miles of the place where it was taken. [13] This is for the benefit of the tenants, that they may know where to find and replevy the distress. And by statute 11 Geo. II. c. 19, which was made for the benefit of landlords, any person distraining for rent may turn any part of the premises upon which a distress is taken into a pound, *pro hac vice*, for securing of such distress. If a live distress, of animals, be impounded in a *common* pound-overt, the owner must take notice of it at his peril; but if in any *special* pound-overt, so constituted for this particular purpose, the distrainor must give notice to the owner; and in both these cases the owner, and not the distrainor, is bound to provide the beasts with food and necessaries. But if they are put in a pound-covert, in a stable, or the like, the landlord or distrainor must feed and sustain them. A distress of household goods or other dead chattels which are liable to be stolen or damaged by weather, ought to be impounded in a pound-covert, else the distrainor must answer for the consequences.

When impounded the goods were formerly only in the

nature of a pledge or security to compel the performance of satisfaction, and upon this account it hath been held that the distrainor is not at liberty to work or use a distrained beast. And thus the law still continues with regard to beasts taken damage-feasant, and distresses for suit or services which must remain impounded till the owner makes satisfaction or contests the right of distraining by replevying the chattels. **To replevy**[8] (*replegiare,* that is, to take back the pledge) is when a person distrained upon applies to the sheriff or his officers, and has the distress returned into his own possession upon giving good security to try the right of taking it in a suit of law, and, if that be determined against him, to return the cattle or goods once more into the hands of the distrainor.

This kind of distress, though it puts the owner to inconvenience, and is therefore a punishment to *him,* yet, if he continues obstinate and will make no satisfaction or payment, it is no remedy at all to the distrainor. [14] But for a debt due to the crown, unless paid within forty days, the distress was always salable at common law. And for an amercement imposed at a court-leet the lord may also sell the distress; partly because, being the king's court of record, its process partakes of the royal prerogative, but principally because it is in the nature of an execution to levy a legal debt. And so, in the several statute-distresses before mentioned, which are also in the nature of executions, the power of sale is likewise usually given to effectuate and complete the remedy. And in like manner, by several acts of parliament, in all cases of distress for rent, if the tenant or owner do not, within five days after the distress is taken, and notice of the cause thereof given him, replevy the same with sufficient security, the distrainor, with the sheriff or constable, shall cause the same to be appraised by two sworn appraisers, and sell the same towards satisfaction of the rent and charges, rendering the overplus, if any, to the owner himself.

The many particulars which attend the taking of a distress used formerly to make it a hazardous kind of pro-

8. See action of replevin, *post.*

ceeding; for **if any one irregularity was committed it vitiated the whole, and made the distrainors trespassers ab initio.**[9] [15] But now, by the statute 11 Geo. II. c. 19, it is provided, that for any unlawful act done the whole shall not be unlawful or the parties trespassers *ab initio,* but that the party grieved shall only have an action for the real damage sustained, and not even that if tender of amends is made before any action is brought.

VI. **The seizing of heriots,** when due on the death of a tenant, is also another species of self-remedy, not much unlike that of taking cattle or goods in distress. As for that division of heriots which is called heriot-service, and is only a species of rent, the lord may distrain for this as well as seize; but for heriot-custom (which Sir Edward Coke says lies only in *prender,* and not in *render*) the lord may seize the identical thing itself, but cannot distrain any other chattel for it. The like speedy and effectual remedy of seizing is given with regard to many things that are said to lie in franchise, as **waifs, wrecks, estrays, deodands,** and the like, all which the person entitled thereto may seize without the formal process of a suit or action.

I shall next briefly mention **such remedies as arise from the joint act of all the parties together.**

I. **Accord is a satisfaction agreed upon between the party injuring and the party injured, which, when performed, is a bar of all actions upon this account.**[1]

II. **Arbitration is where the parties, injuring and injured, submit all matters in dispute concerning any personal chattels or personal wrong to the judgment of two or more arbitrators, who are to decide the controversy;** and if they do not agree it is usual to add that another person be called in as *umpire* (*imperator* or *impar*), to whose sole judgment it is then referred; or frequently there is only one arbitra-

9. This is the rule in the leading case known as the Six Carpenters' Case, viz., that if a man abuses an authority given him by law, he becomes a trespasser *ab initio,* i. e., from the beginning, though it is otherwise of an authority given by the party. The Six Carpenters' Case, 8 Coke, 146; 1 Smith's Lead. Cases, *216.

A mere nonfeasance does not amount to such an abuse as renders a man a trespasser *ab initio.* Ib.; see, also, Cooley on Torts (Students' Ed.), 331; Hale on Torts, 391.

1. See the leading case of Cumber v. Wane, 1 Strange, 426; 1 Smith's Lead. Cases, *439 and notes, where the subject is fully considered.

tor originally appointed. This decision in any of these cases is called an **award.** And thereby the question is as fully determined, and the right transferred or settled, as it could have been by the agreement of the parties or the judgment of a court of justice. **But the right of real property cannot thus pass by a mere award,** which subtilty in point of form (for it is now reduced to nothing else) had its rise from feodal principles; for if this had been permitted the land might have been aliened collusively without the consent of the superior. Yet doubtless an arbitrator may now award a conveyance or a release of land, and it will be a breach of the arbitration-bond to refuse compliance. For though originally the submission to arbitration used to be by word or by deed, yet both of these, being revocable in their nature, **it is now become the practice to enter into mutual bonds with condition to stand to the award** or arbitration of the arbitrators or umpire therein named. The legislature has now established the use of arbitrations, as well in controversies where causes are depending as in those where no action is brought, enacting, by statute 9 & 10 W. III. c. 15, that all merchants and others who desire to end any controversy, suit, or quarrel (for which there is no other remedy but by personal action or suit in equity), **may agree that their submission of the suit to arbitration or umpirage shall be made a rule of any of the king's courts of record,**[2] and may insert such agreement in their submission or promise, or condition of the arbitration-bond; which agreement being proved upon oath by one of the witnesses thereto, the court shall make a rule that such submission and ward shall be conclusive. And after such rule made, the parties disobeying the award shall be liable to be punished as for a contempt of the court, unless such award shall be set aside for corruption or other misbehavior in the arbitrators or umpire, proved on oath to the court within one term after the award is made.

2. Similar statutes are to be found probably in all the states, including causes of action both real and personal. In Illinois, the statute includes both suits pending and also matters not in suit. See Ill. Rev. Stat., ch. 10, secs. 1 and 16.

CHAPTER II.

OF REDRESS BY THE MERE OPERATION OF LAW.

The remedies for private wrongs which are effected by the mere operation of the law will fall within a very narrow compass, there being only two instances of this sort that at present occur to my recollection; the one that of **retainer**, where a creditor is made executor or administrator to his debtor; the other, in the case of what the law calls a **remitter**. [18]

I. **If a person indebted to another makes his creditor or debtee his executor, or if such a creditor obtains letters of administration to his debtor, in these cases the law gives him a remedy for his debt by allowing him to retain so much as will pay himself before any other creditors whose debts are of equal degree.**[1] But the executor shall not retain his own debt in prejudice to those of a higher degree. Neither shall one executor be allowed to retain his own debt in prejudice to that of his co-executor in equal degree, but both shall be discharged in proportion. Nor shall an executor of his own wrong be in any case permitted to retain.

II. **Remitter is where he who hath the true property or jus proprietatis in lands, but is out of possession thereof, and hath no right to enter without recovering possession in an action, hath afterwards the freehold cast upon him by some subsequent and, of course, defective title: in this case he is remitted or sent back by operation of law to his ancient and more certain title.**[2]

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1. This is the rule of the common law, but in the United States, except in a few states, all creditors of equal rank share alike. Schouler on Wills and Admin., 509 and note.

By the common law, also, the appointment of one's debtor to be executor of the will was held to extinguish the debt, though this favor did not extend to an administrator, but in the United States it is, as a rule, otherwise. Schouler on Wills and Admin., 412 and note.

2. See, generally, 18 Vin. Abr. tit. Remitter; Co. Litt., 347 note. Where the right is barred by the Statute of Limitations there can be no remitter. Daniel v. Woodroff, 10 M. & W. 608; 15 id. 769; 2 H. L. Cas. 811.

As if A disseizes B, that is, turns him out of possession, and dies, leaving a son, C, hereby the estate descends to C, the son of A, and B is barred from entering thereon till he proves his right in an action. Now if afterwards C, the heir of the disseizor, makes a lease for life to D, with remainder to B, the disseizee, for life, and D dies, hereby the remainder accrues to B, the disseizee, who thus gaining a new freehold by virtue of the remainder, which is a bad title, is by act of law *remitted*, or in of his former and surer estate. [20] For he hath hereby gained a new right of possession, to which the law immediately annexes his ancient right of property.

If the subsequent estate, or right of possession, be gained by a man's own act or consent, as by immediate purchase, being of full age, he shall not be remitted, for the taking such subsequent estate was his own folly, and shall be looked upon as a waiver of his prior right. Therefore it is to be observed that to every remitter there are regularly these incidents: an ancient right, and a new defeasible estate of freehold uniting in one and the same person, which defeasible estate must be *cast upon* the tenant, not gained by his own act or folly. But there shall be no remitter to a right for which the party has no remedy by action. [21]

CHAPTER III.

OF COURTS IN GENERAL.

The next and principal object of our inquiries is the redress of injuries by *suit in courts*, wherein the act of the parties and the act of law co-operate. [22]

And here, **although in the several cases of redress by the act of the parties mentioned in a former chapter, the law allows an extrajudicial remedy, yet that does not exclude the ordinary course of justice**, but it is only an additional weapon put into the hands of certain persons in particular instances. Therefore, though I may defend myself or relations from external violence, I yet am afterwards entitled to an action of assault and battery; though I may retake my goods, if I have a fair and peaceable opportunity, this power of recaption does not debar me from my action of trover or detinue, &c.

But as to remedies by the mere operation of law, those are indeed given, because no remedy *can* be ministered by suit or action without running into the palpable absurdity of a man's bringing an action against himself, the two cases wherein they happen being such wherein the only possible legal remedy would be directed against the very person himself who seeks relief. [23]

In all other cases it is a general and indisputable rule, that where there is a legal right there is also a legal remedy by suit or action at law, whenever that right is invaded.[1]

First, then, of courts of justice. **A court is defined to be a place wherein justice is judicially administered.**[2]

Courts are either courts *of record* or *not of record*. **A court of record** is that where the acts and judicial proceedings are enrolled in parchment for a perpetual memorial and testimony, which rolls are called the records of the

1. Every injury imports a damage; and wherever there has been an invasion of a legal right the law gives a remedy by action. This is the rule in the great case of Ashby v. White, Ld. Raym. 938; 1 Smith's Lead Cases, *342 *et seq.*; Broom's Leg. Max., *180.

2. A court is a tribunal established by law for the administration of justice according to law.

court, and are of such high and supereminent authority that their truth is not to be called in question. [24] **For it is a settled rule and maxim that nothing shall be averred against a record, nor shall any plea, or even proof, be admitted to the contrary.**[3] And if the existence of a record be denied, it shall be tried by nothing but itself, that is, upon bare inspection whether there be any such record or no, else there would be no end of disputes. But if there appear any mistake of the clerk in making up such record, the court will direct him to amend it. All courts of record are the king's courts, in right of his crown and royal dignity, and therefore no other court hath authority to fine or imprison, so that the very erection of a new jurisdiction with the power of fine or imprisonment makes it instantly a court of record. [25] **A court not of record** is the court of a private man [not so in the United States], whom the law will not intrust with any discretionary power over the fortune or liberty of his fellow-subjects. Such are the courts-baron incident to every manor and other inferior jurisdictions where the proceedings are not enrolled or recorded; but as well their existence as the truth of the matters therein contained shall, if disputed, be tried and determined by a jury. These courts can hold no plea of matters cognizable by the common law unless under the value of 40*s.*, nor of any forcible injury whatsoever, not having any process to arrest the person of the defendant.[4]

In every court there must be at least three constituent parts, the actor, reus, and judex: the *actor,* or plaintiff, who complains of an injury done; the *reus,* or defendant, who is called upon to make satisfaction for it; and the *judex,*

3. Where a court of general jurisdiction has jurisdiction of the parties and of the subject-matter, the above-stated rule, in the absence of fraud, will always apply. See Cooley's Const. Lim. (7th Ed.), 40, 585 and notes; and in superior courts of record proceeding according to the course of the common law and not exercising some special or limited jurisdiction, jurisdiction will be presumed unless the contrary appears. On the other hand, no such intendment is made in favor of the judgment of a court of limited jurisdiction, but jurisdiction must affirmatively appear on the face of the minutes of the proceedings. Cooley's Const. Lim. (7th Ed.), 585 and cases cited.

4. The most common court not of record in the United States is that of justices of the peace.

or judicial power, which is to examine the truth of the fact, to determine the law arising upon that fact, and if any injury appears to have been done, to ascertain, and by its officers to apply the remedy. It is also usual in the superior courts to have attorneys and advocates, or counsel, as assistants.

An attorney at law is one who is put in the place, stead, or turn of another to manage his matters of law. Formerly every suitor was obliged to appear in person to prosecute or defend his suit,— according to the old Gothic constitution,— unless by special license under the king's letters patent. This is still the law in criminal cases.[5] And an idiot cannot to this day appear by attorney, but in person, for he hath not discretion to enable him to appoint a proper substitute; and upon his being brought before the court in so defenceless a condition, the judges are bound to take care of his interests, and they shall admit the best plea in his behalf that any one present can suggest. [26] But with us, upon the principle of convenience, it is now permitted in general, by divers ancient statutes, whereof the first is statute Westm. 3, c. 10, that **attorneys may be made to prosecute or defend any action in the absence of the parties to the suit.** These attorneys are now formed into a regular corps; **they are admitted to the execution of their office by the superior courts of Westminster Hall, and are in all points officers of the respective courts of which they are admitted,** and as they have many privileges on account of their attendance there, so they are peculiarly subject to the censure and animadversion of the judges. No man can practice as an attorney in any of those courts but such as is admitted and sworn an attorney of that particular court; an attorney of the Court of King's Bench cannot practise in the Court of Common Pleas, nor *vice versa*. [Serjeants no longer monopolize the practice of the Common Pleas.] To practise in the Court of Chancery it is also necessary to be admitted a solicitor therein. So early as the statute

5. Parties may now always appear by attorney except in certain dilatory pleas considered later on.

4 Henry IV. c. 18, it was enacted that attorneys should be examined by the judges, and none admitted but such as were virtuous, learned, and sworn to do their duty. And many subsequent statutes have laid them under farther regulations.

Of advocates or, as we generally call them, counsel, there are two species or degrees, barristers and serjeants. The former are admitted after a considerable period of study, or at least standing, in the inns of court, and are in our old books styled apprentices, *apprenticii ad legem*,[6] being looked upon as merely learners and not qualified to execute the full office of an advocate till they were sixteen years standing, at which time, according to Fortescue, they might be called to the state and degree of serjeants, or *servientes ad legem*.[7] [27] Serjeants at law are bound by a solemn oath to do their duty to their clients; and that by custom the judges of the courts of Westminster are always admitted into this venerable order before they are advanced to the bench. From both these degrees some are usually selected to be his majesty's counsel learned in the law, the two principal of whom are called his **attorney and solicitor-general.** They must not be employed in any cause against the crown without special license. A custom has of late years prevailed of granting **letters patent of precedence** to such barrister as the crown thinks proper to honor with that mark of distinction, whereby they are entitled to such rank and pre-audience as are assigned in their respective patents; sometimes next after the king's attorney-general, but usually next after his majesty's counsel then being. These, as well as the queen's attorney and solicitor-general, rank promiscuously with the king's counsel, and together with them sit within the bar of the respective courts, but receive no salaries, and are not sworn, and therefore are at liberty to be retained in causes against the crown. And all other serjeants and barristers indiscriminately, except in the Court of Common Pleas, where only serjeants are admitted, may take upon them the protection and defence

6. Apprentices at law.
7. Servants (or sergeants) at law. The degree of sergeant has been abolished.

of any suitors, whether plaintiff or defendant, who are therefore called their **clients**, like the dependants upon the ancient Roman orators. Those, indeed, practised *gratis*, for honor merely, or at most for the sake of gaining influence; and so likewise it is established with us that **a counsel can maintain no action for his fees**,[8] which are given, not as *locatio vel conductio*, but as *quiddam honorarium;* not as a salary or hire, but as a mere gratuity, which a counsellor cannot demand without doing wrong to his reputation. And in order to encourage **due freedom of speech in the lawful defence of their clients**, and at the same time to give a check to the unseemly licentiousness of prostitute and illiberal men, it hath been holden that a counsel is not answerable for any matter by him spoken relative to the cause in hand and suggested in his client's instructions, although it should reflect upon the reputation of another, and even prove absolutely groundless; but if he mentions an untruth of his own invention, or even upon instructions if it be impertinent to the cause in hand, he is then liable to an action from the party injured.[9] And counsel guilty of deceit or collusion are punishable by the statute Westm. I. 3 Edw. I. c. 28, with imprisonment for a year and a day, and perpetual silence in the courts,— a punishment still sometimes inflicted for gross misdemeanors in practice.[1]

8. Otherwise in the United States, where attorneys at law may maintain actions for their fees. The distinction between attorneys and barristers at law prevails in Canada, but not in the federal and state jurisdictions, except in New Jersey.

9. Cooley's Const. Lim. (7th Ed.), 631 and notes. See, generally, as to attorneys at law, Thornton on Attorneys (1914), 2 vols.; Weeks on Attorneys (2d Ed.), 1892; 2 Broom & Hadley's Com., *22 *et seq.*

1. As to the liability of attorneys for negligence, see Cooley on Torts (Students' Ed.), 670.

CHAPTER IV.

OF THE PUBLIC COURTS OF COMMON LAW AND EQUITY.[1]

Courts of justice in this kingdom are either such as are of public and general jurisdiction throughout the whole realm, or such as are only of a private and special jurisdiction in some particular parts of it. [30] **Of the former there are four sorts: the universally established courts of common law and equity, the ecclesiastical courts, the courts military, and courts maritime.**

And, first, of such public courts as are courts of common law and equity.

I. The lowest, and at the same time the most expeditious, court of justice known to the law of England is **the court of piepoudre** (*curia pedis pulverizati*),[2] so called from the dusty feet of the suitors, or, according to Sir Edward Coke, because justice is there done as speedily as

1. A most radical change has been made in the English system of courts by the Supreme Court of Judicature Act of 1873 and 1875, to which the student is referred for particulars. Without going into details it may be here stated that nearly all the then existing courts were consolidated into one great court called "The Supreme Court of Judicature," consisting of two divisions, one a court of original jurisdiction (the High Court of Justice), and one of appellate jurisdiction ("Her Majesty's Court of Appeal"). The House of Lords still holds its final appellate jurisdiction. The High Court of Justice consisted originally of five divisions called respectively the Queen's Bench, Common Pleas, Exchequer, Chancery and Probate, Divorce and Admiralty Divisions, which, in substance, succeeded the courts of corresponding name. The three common law divisions were later in 1881 united into the Queen's Bench Division. One rule of great importance was established, viz., that except as to probate, divorce and admiralty cases which must be brought in the division of that name, the classification of cases indicated by the names of the divisions was not *jurisdictional*, but rather one of convenience for the dispatch of business, so that an error as to the selection of the court of first instance would not result in the dismissal of the action or bill as formerly, but, at most, only in its transfer to another division. Other important changes were made, but for details the statutes must be consulted.

As the books for generations back are full of references to the old system, it has been retained in the text.

2. Court of dusty feet. The description of these courts is now of historical interest only.

dust can fall from the foot. [32] But the etymology given us by a learned modern writer [Barrington] is much more ingenious and satisfactory, it being derived, according to him, from *pied puldreaux* (a pedler, in old French), and therefore signifying the court of such petty chapmen as resort to fairs or markets. It is a court of record incident to every fair and market, of which the steward of him who owns or has the toll of the market is the judge, and its jurisdiction extends to administer justice for all commercial injuries done in that very fair or market, and not in any preceding one. So that the injury must be done, complained of, heard, and determined within the compass of one and the same day, unless the fair continues longer. The court hath cognizance of all matters of contract that can possibly arise within the precinct of that fair or market, and the plaintiff must make oath that the cause of an action arose there. [33]

II. **The court-baron** is a court incident to every manor in the kingdom, to be holden by the steward within the said manor. This court-baron is of two natures: the one is a customary court, of which we formerly spoke, appertaining entirely to the copyholders, in which their estates are transferred by surrender and admittance, and other matters transacted relative to their tenures only. The other, of which we now speak, is a court of common law; and it is the court of the barons, by which name the freeholders were sometimes anciently called, for that it is held before the freeholders who owe suit and service to the manor, the steward being rather the registrar than the judge. These courts, though in their nature distinct, are frequently confounded together. The court we are now considering, viz., the freeholders' court, was composed of the lord's tenants, who were the *pares* of each other, and were bound by their feodal tenure to assist their lord in the dispensation of domestic justice. This was formerly held every three weeks, and its most important business is to determine, by writ of right, all controversies relating to the right of lands within the manor. It may also hold plea of any personal actions, of debt, trespass on the case, or the like, where the debt or damages do not amount to forty shillings.

III. **A hundred-court** is only a larger court-baron, being held for all the inhabitants of a particular hundred instead of a manor. [34] The free suitors are here also the judges, and the steward the registrar, as in the case of court-baron. It is likewise no court of record, resembling the former in all points, except that in point of territory it is of greater jurisdiction.

IV. **The county-court**[3] is a court incident to the jurisdiction of the sheriff. It is not a court of record, but may hold pleas of debt or damages under the value of forty shillings. The county-court may also hold plea of many real actions, and of all personal actions to any amount by virtue of a special writ called a *justicies*, which is a writ empowering

3. We have county courts in some of the states, but they are statutory courts quite different from the one described in the text.

the sheriff for the sake of despatch to do the same justice in his county-court as might otherwise be had at Westminster. [36] The freeholders of the county are the real judges in this court, and the sheriff is the ministerial officer.

V. **The Court of Common Pleas, or, as it is frequently** termed in law, the court of *common bench.* [37]

By the ancient Saxon constitution there was only one superior court of justice in the kingdom, and that court had cognizance both of civil and spiritual causes, viz., the *wittena-gemote,* or general council, which assembled annually, or oftener, wherever the king kept his Christmas, Easter, or Whitsuntide, as well to do private justice as to consult upon public business. At the Conquest the ecclesiastical jurisdiction was diverted into another channel, and the Conqueror, fearing danger from these annual parliaments, contrived also to separate their ministerial power, as judges, from their deliberative, as counselors to the crown. He therefore established a constant court in his own hall, thence called by Bracton and other ancient authors *aula regia,* or *aula regis.*[4] This court was composed of the king's great officers of state resident in his palace and usually attendant on his person. These high officers were assisted by certain persons learned in the laws, who were called the king's justiciars or justices, and by the greater barons of parliament, all of whom had a seat in the *aula regia,* and formed a kind of court of appeal, or rather of advice, in matters of great moment and difficulty. [38] All these in their several departments transacted all secular business, both criminal and civil, and likewise the matters of the revenue; and over all presided one special magistrate, called the chief justiciar, or *capitalis justiciarius totius Angliae,*[5] who was also the principal minister of state, the second man in the kingdom, and by virtue of his office guardian of the realm in the king's absence. This great universal court being bound to follow the king's household in all his progresses and expeditions, the trial of common causes therein was found very burdensome to the subject.

4. Hall or Court of the King, the King's Bench.

5. Chief justice of all England.

Wherefore King John, who dreaded also the power of the justiciar, very readily consented to that article which now forms the eleventh chapter of *Magna Carta,* and enacts "**that communia placita non sequantur curiam regis, sed teneantur in aliquo loco certo.**"[6] This certain place was established in Westminster Hall, the place where the *aula regis* originally sat when the king resided in that city, and there it hath ever since continued. And the court being thus rendered fixed and sationary, the judge became so too, and a chief with other justices of the Common Pleas was thereupon appointed, with jurisdiction to hear and determine all pleas of land, and injuries merely civil, between subject and subject.

The *aula regia* being thus stripped of so considerable a branch of its jurisdiction, and the power of the chief justiciar being also considerably curbed by many articles in the Great Charter, the authority of both began to decline apace under the long and troublesome reign of King Henry III. And, in further pursuance of this example, the other several offices of the chief justiciar were under Edward I. (who new-modelled the whole frame of our judicial polity) subdivided and broken into distinct courts of judicature. **A court of chivalry** was erected, over which the constable and mareschal presided, as did the steward of the household over another constituted to regulate the king's domestic servants. **The high steward, with the barons of parliament,** formed an august tribunal for the trial of delinquent peers, and **the barons reserved to themselves in parliament the right of reviewing the sentences of other courts in the last resort.** The distribution of common justice between man and man was thrown into so provident an order that the great judicial officers were to form a check upon each other, **the Court of Chancery issuing all original writs under the Great Seal to the other courts, the Common Pleas being allowed to determine all causes between private subjects, the Exchequer managing the king's revenue, and the Court of King's Bench retaining all the jurisdiction which was not cantoned out to other courts, and particularly the superintendence of all the rest by way of appeal, and the sole cognizance of pleas of the crown or criminal causes.** [40]

For pleas or suits are regularly divided into two sorts: **pleas of the crown,** which comprehend all crimes and mis-

6. Let not the common pleas follow the King's Court, but be held in some certain place.

demeanors, wherein the king (on behalf of the public) is the plaintiff, and **common pleas**, which include all civil actions depending between subject and subject. The former of these were the proper object of the jurisdiction of the Court of King's Bench, the latter of the Court of Common Pleas, which is a court of record, and is styled by Sir Edward Coke the lock and key of the common law; for herein only can real actions — that is, actions which concern the right of freehold or the realty — be originally brought, and all other or personal pleas between man and man are likewise here determined, though in most of *them* the King's Bench has also a concurrent authority.

The judges of this court are at present four in number, one chief and three puisne justices, created by the king's letters-patent, who sit every day in the four terms to hear and determine all matters of law arising in civil causes, whether real, personal, or mixed and compounded of both. [The constitution of this and of the other superior courts below mentioned was changed by the Supreme Court of Judicature Act, which see.] These it takes cognizance of, as well originally as upon removal from the inferior courts before mentioned. But a writ of error, in the nature of an appeal, lies from this court into the Court of King's Bench.

VI. **The Court of King's Bench** (so called because the king used formerly to sit there in person, the style of the court still being *coram ipso rege*)[7] is the supreme court of common law in the kingdom, consisting of a chief justice and three *puisne*[8] justices, who are by their office the sovereign conservators of the peace and supreme coroners of the land. [41] Yet though the king himself used to sit in this court, and still is supposed so to do, he did not, neither by law is he empowered to, determine any cause or motion but by the mouth of his judges, to whom he hath committed his whole judicial authority.

This court, which (as we have said) is the remnant of the *aula regia*, is not, nor can be, from the very nature and constitution of it, fixed to any certain place, but may follow the king's person wherever he goes; for which reason all process issuing out of this court in the king's name is re-

7. Before the king himself. 8. Younger.

turnable "*ubicunque fuerimus in Anglia.*"[9] It hath, indeed, for some centuries past, usually sat at Westminster, being an ancient palace of the crown, but might remove with the king to York or Exeter, if he thought proper to command it.

The jurisdiction of this court is very high and transcendent. It keeps all inferior jurisdictions within the bounds of their authority, and may either remove their proceedings to be determined here, or prohibit their progress below. [42] It superintends all civil corporations in the kingdom. It commands magistrates and others to do what their duty requires, in every case where there is no other specific remedy. It protects the liberty of the subject by speedy and summary interposition. It takes cognizance both of criminal and civil causes; the former in what is called the crown-side or crown-office, the latter in the plea-side of the court. The jurisdiction of the crown-side it is not our present business to consider. But on the plea-side, or civil branch, it hath an original jurisdiction and cognizance of all actions of trespass, or other injury alleged to be committed *vi et armis;*[1] of actions for forgery of deeds, maintenance, conspiracy, deceit, and actions on the case which allege any falsity or fraud; all of which savor of a criminal nature, although the action is brought for a civil remedy, and make the defendant liable in strictness to pay a fine to the king as well as damages to the injured party. The same doctrine is also now extended to all actions on the case whatsoever; but no action of debt or detinue, or other mere civil action, can by the *common law* be prosecuted by any subject in this court, by *original* writ out of Chancery, though an action of debt, given by *statute*, may be brought in the King's Bench as well as in the Common Pleas. And yet this court might always have held plea of any civil action (other than actions real), provided the defendant was an officer of the court, or in the custody of the marshal or prison-keeper of this court, for a breach of the peace or any other offence. And in process of time it began by a fiction to hold plea of all personal actions whatsoever, and

9. Wherever we shall be in England.

1. Force and arms.

has continued to do so for ages; it being surmised that the defendant is arrested for a supposed trespass which he never has in reality committed, and being thus in the custody of the marshal of the court, the plaintiff is at liberty to proceed against him for any other personal injury, which surmise of being in the marshal's custody the defendant is not at liberty to dispute. [43] And these fictions of law, though at first they may startle the student, he will find upon further consideration to be highly beneficial and useful, especially as this maxim is ever invariably observed, that **no fiction shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience that might result from the general rule of law.**

For this court is likewise a court of appeal into which may be removed by a writ of error all determinations of the Court of Common Pleas and all inferior courts of record in England, and to which a writ of error lies also from the Court of King's Bench in Ireland. Yet even this so high and honorable court is not the *dernier resort* of the subject, for if he be not satisfied with any determination here he may remove it by writ of error into the House of Lords or the Court of Exchequer Chamber, as the case may happen, according to the nature of the suit and the manner in which it has been prosecuted.

VII. **The Court of Exchequer is inferior in rank not only** to the Court of King's Bench, but to the Common Pleas also; but I have chosen to consider it in this order on account of its double capacity as a court of law and a court of equity also. It is a very ancient court of record set up by William the Conqueror as a part of the *aula regia*, though regulated and reduced to its present order by King Edward I., and **intended principally to order the revenues of the crown and to recover the king's debts and duties.** [44] It consists of two divisions: the receipt of the exchequer which manages the royal revenue, and with which these Commentaries have no concern, and the court or judicial part of it, which is again subdivided into a court of equity and a court of common law.

The Court of Equity is held in the Exchequer Chamber before the Lord Treasurer, the Chancellor of the Exchequer, the Chief Baron, and three *puisne* ones. The primary and original business of this court is to call the king's debtors to account by bill filed by the attorney-general, and to recover any lands, tenements, or hereditaments, any goods, chattels, or other profits or benefits, belonging to the crown. So that by their original constitution the jurisdiction of the Court of Common Pleas, King's Bench, and Exchequer was entirely separate and distinct: the Common Pleas being intended to decide all controversies between subject and subject; the King's Bench to correct all crimes and misdemeanors that amount to a breach of the peace, the king being then plaintiff, as such offences are in open derogation of the *jura regalia*[2] of his crown; and the Exchequer to adjust and recover his revenue, wherein the king also is plaintiff, as the withholding and non-payment thereof is an injury to his *jura fiscalia*. [45] But, as by a fiction almost all sorts of civil actions are now allowed to be brought in the King's Bench, in like manner by another fiction all kinds of personal suits may be prosecuted in the Court of Exchequer. For as all the officers and ministers of this court have, like those of other superior courts, the privilege of suing and being sued only in their own court, so also the king's debtors and farmers, and all accomptants of the Exchequer, are privileged to sue and implead all manner of persons in the same court of equity that they themselves are called into. They have likewise privilege to sue and implead one another, or any stranger, in the same kind of common-law actions (where the personalty only is concerned) as are prosecuted in the Court of Common Pleas.

This gives origin to the common-law part of their jurisdiction, which was established merely for the benefit of the king's accomptants, and is exercised by the barons only of the Exchequer, and not the treasurer or chancellor. The writ upon which all proceedings here are grounded is called a *quo minus*, in which the plaintiff suggests that he is the king's farmer or debtor, and that the defendant hath done

2. Royal rights.

him the injury or damage complained of, *quo minus sufficiens existit*,[3] by which he is less able to pay the king his debt or rent. And these suits are expressly directed, by what is called the statute of Rutland, to be confined to such matters only as specially concern the king or his ministers of the Exchequer. And by the *articuli super cartas*,[4] it is enacted that no common plea be thenceforth holden in the Exchequer contrary to the form of the Great Charter. But now, by the suggestion of privilege, any person may be admitted to sue in the Exchequer as well as the king's accomptant. The surmise, of being debtor to the king, is therefore become matter of form and mere words of course, and the court is open to all the nation equally. The same holds with regard to the equity side of the court, for there any person may file a bill against another upon a bare suggestion that he is the king's accomptant; but whether he is so or not is never controverted. [46] In this court on the equity side the clergy have long used to exhibit their bills for the non-payment of thithes, in which case the surmise of being the king's debtor is no fiction, they being bound to pay him their first-fruits and annual tenths. But the Chancery has of late years obtained a large share in this business.

An appeal from the equity side of this court lies immediately to the House of Peers; but from the common law side, in pursuance of the statute 31 Edw. III. c. 12, a writ of error must be first brought into the Court of Exchequer Chamber. And from the determination there had there lies in the *dernier resort*[5] a writ of error to the House of Lords.

VIII. **The High Court of Chancery** is the only remaining, and in matters of civil property by much the most important of any of the king's superior and original courts of justice. It has its name of chancery, *cancellaria*, from the judge who presides here, the Lord Chancellor or *Cancellarius*, who, Sir Edward Coke tells us, is so termed *a cancellando* from cancelling the king's letters patent when granted contrary to law, which is the highest point of his

3. By which he is less able.
4. Articles on the charters.
5. Last resort.

jurisdiction. When seals came in use he had always the custody of the king's great seal. [47] So that the office of chancellor or lord keeper (whose authority by statute 5 Eliz. c. 18, is declared to be exactly the same) is with us at this day created by the mere delivery of the king's great seal into his custody, whereby he becomes, without writ or patent, an officer of the greatest weight and power of any now subsisting in the kingdom, and superior in point of precedency to every temporal lord.

He is a Privy Councillor by his office, and, according to Lord Chancellor Ellesmere, prolocutor of the House of Lords by prescription. To him belongs the appointment of all justices of the peace throughout the kingdom. Being formerly usually an ecclesiastic (for none else were then capable of an office so conversant in writings), and presiding over the royal chapel, he became keeper of the king's conscience; visitor, in right of the king, of all hospitals and colleges of the king's foundation; and patron of all the king's livings under the value of twenty marks *per annum* in the king's books. He is the general guardian of all infants, idiots, and lunatics, and has the general superintendence of all charitable uses in the kingdom.

And all this, over and above the vast and extensive jurisdiction which he exercises in his *judicial* capacity in the Court of Chancery; wherein, as in the Exchequer, there are two distinct tribunals: the one ordinary, being a court of common law; the other extraordinary, being a court of equity.

The ordinary legal court is much more ancient than the court of equity. Its jurisdiction is to hold plea upon a *scire facias*[6] to repeal and cancel the kign's letters-patent, when made against law, or upon untrue suggestions; and to hold plea of petitions, *monstrans de droit*,[7] traverses of offices, and the like, when the king hath been advised to do any act, or is put in possession of any lands or goods, in prejudice of a subject's right. It also appertains to this court to hold plea of all personal actions, where any officer or minister of the court is a party. [48] It might likewise hold plea (by *scire facias*) of partitions of land in coparcenery, and of dower, where any ward of the crown was concerned in interest, so long as the military tenures subsisted; as it now may also do of the tithes of forest land, where granted by the king, and claimed by a stranger

6. Make known or show why. 7. Showing of right.

against the grantee of the crown, and of executions on statutes, or recognizances in nature thereof, by the statute 23 Hen. VIII. c. 6. But if any cause comes to issue in this court, that is, if any fact be disputed between the parties, the chancellor cannot try it, having no power to summon a jury, but must deliver the record *propria manu*[8] into the Court of King's Bench, where it shall be tried by the country and judgment shall be there given thereon. And when judgment is given in chancery upon demurrer or the like, a writ of error in nature of an appeal lies out of this ordinary court into the Court of King's Bench; though so little is usually done on the common-law side of the court, that I have met with no traces of any writ of error being actually brought since the fourteenth year of Queen Elizabeth, A. D. 1572.

In this ordinary or legal court is also kept the officina justitiae;[9] out of which all original writs that pass under the great seal, all commissions of charitable uses, sewers, bankruptcy, idiocy, lunacy, and the like, do issue; and for which it is always open to the subject, who may there at any time demand and have, *ex debito justitiae*,[1] any writ that his occasions may call for. [49]

But the Extraordinary Court, or Court of Equity, is now become the court of the greatest judicial consequence.

In early times the chief judicial employment of the chancellor must have been in devising new writs, directed to the courts of common law, to give remedy in cases where none was before administered. And to quicken the diligence of the clerks in the chancery, who were too much attached to ancient precedents, **it is provided by statute Westm. 2, 13 Edw. I. c. 24, that "Whensoever from thenceforth in one case a writ shall be found in the Chancery, and in a like case falling under the same right and requiring like remedy, no precedent of a writ can be produced, the clerks in Chancery shall agree in forming a new one; and, if they cannot agree, it shall be adjourned to the next parliament, where a writ shall be framed by consent of the learned in the law, lest it happen for the future, that the court of our lord the king be deficient in doing justice to the suitors."** [51] And this accounts for the very great variety of writs of trespass on the case, to be met with in the register,

8. With his own hand.
9. Office of justice.
1. Out of debt to justice.

whereby the suitor had ready relief, according to the exigency of his business, and adapted to the specialty, reason, and equity of his very case, — which provision (with a little accuracy in the clerks of the Chancery, and a little liberality in the judges, by extending rather than narrowing the remedial effects of the writ) might have effectually answered all the purposes of a court of equity, except that of obtaining a discovery by the oath of the defendant.

But when, **about the end of the reign of King Edward III.**, uses of land were introduced, and, though totally discountenanced by the courts of common law, were considered as fiduciary deposits and binding in conscience by the clergy, **the separate jurisdiction of the Chancery as a court of equity began to be established**; and John Waltham, who was Bishop of Salisbury and Chancellor to King Richard II., by a strained interpretation of the above-mentioned statute of Westm. 2, devised the **writ of subpoena**, returnable in the Court of Chancery only, to make the feoffee to uses accountable to his *cestuy que use;* and in Edward IV.'s time the process by bill and *subpoena* was become the daily practice of the court. [52]

But this did not extend very far; for in the ancient treaties, entitled *diversite des courtes,*[2] supposed to be written very early in the sixteenth century, we have a catalogue of the matters of conscience then cognizable by *subpoena* in Chancery, which fall within a very narrow compass. [53] No regular judicial system at that time prevailed in the court; but the suitor, when he thought himself aggrieved, found a desultory and uncertain remedy, according to the private opinion of the chancellor, who was generally an ecclesiastic, or sometimes (though rarely) a statesman; no lawyer having sat in the Court of Chancery from the times of the Chief Justices Thorpe and Knyvet, successively chancellors to King Edward III. in 1372 and 1373, to the promotion of Sir Thomas More by King Henry VIII. in 1530. After which the great seal was indiscriminately committed to the custody of lawyers, or couriers, or churchmen, according as the convenience of the times and disposition of

2. Diversity of courts.

the prince required, till Serjeant Puckering was made lord keeper in 1592; from which time to the present the Court of Chancery has always been filled by a lawyer, excepting the interval from 1621 to 1625, when the seal was intrusted to Dr. Williams, then Dean of Westminster but afterwards Bishop of Lincoln; who had been chaplain to Lord Ellesmere when chancellor.

Lord Bacon, who succeeded Lord Ellesmere, reduced the practice of the court into a more regular system, but did not sit long enough to effect any considerable revolution in the science itself; and few of his decrees which have reached us are of any great consequence to posterity. His successors, in the reign of Charles I., did little to improve upon his plan; and even after the Restoration the seal was committed to the Earl of Clarendon, who had withdrawn from practice as a lawyer near twenty years; and afterwards to the Earl of Shaftesbury, who (though a lawyer by education) had never practised at all. Sir Heneage Finch, who succeeded in 1673, and became afterwards **Earl of Nottingham**, a person of the greatest abilities and most uncorrupted integrity, a thorough master and zealous defender of the laws and constitution of his country, was enabled, in the course of nine years, to build a system of jurisprudence and jurisdiction upon wide and rational foundations, which have also been extended and improved by many great men, who have since presided in Chancery. [55] And from that time to this, the power and business of the court have increased to an amazing degree.

From this court of equity in Chancery, as from the other superior courts, an appeal lies to the House of Peers. But there are these **differences between appeals from a court of equity and writs of error from a court of law**: 1. That the former may be brought upon any interlocutory matter, the latter upon nothing but only a definite judgment: 2. That on writs of error the House of Lords pronounces the judgment, on appeals it gives direction to the court below to rectify its own decree.

IX. The next court that I shall mention is one that hath no original jurisdiction but is only a court of appeal, to

correct the errors of other jurisdictions. This is **the Court of Exchequer Chamber**, which was first erected by statute 31 Edw. III. c. 12, to determine causes by writs of error from the common-law side of the Court of Exchequer. And to that end it consists of the Lord Chancellor and Lord Treasurer, taking unto them the justices of the King's Bench and Common Pleas. In imitation of which a second Court of Exchequer Chamber was erected by statute 27 Eliz. c. 8, consisting of the justices of the Common Pleas and the barons of the Exchequer, before whom writs of error may be brought to reverse judgments in certain suits originally begun in the Court of King's Bench. [56] Into the court, also of Exchequer Chamber (which then consists of all the judges of the three superior courts, and now and then the Lord Chancellor also), are sometimes adjourned from the other courts such causes as the judges upon argument find to be of great weight and difficulty, before any judgment is given upon them in the court below.

From all the branches of this Court of Exchequer Chamber a writ of error lies to

X. **The House of Peers**, which is the supreme court of judicature in the kingdom, having at present no original jurisdiction over causes, but only upon appeals and writs of error, to rectify any injustice or mistake of the law committed by the courts below.

XI. **Courts of Assize and Nisi Prius** are composed of two or more commissioners who are twice in every year sent by the king's special commission all round the kingdom (except London and Middlesex, where courts of *nisi prius*[3] are holden in and after every term before the chief or other judge of the several superior courts, and except the four northern counties, where the assizes are holden only once a year) to try by a jury of the respective counties the truth of such matters of fact as are then under dispute in the courts of Westminster Hall. [57] These judges of assize came into use in the room of the ancient justices in eyre, *justiciari in itinere:* but the present justices of assize and *nisi prius* are more immediately derived from the statute

3. Unless before.

Westm. 2, 13 Edw. I. c. 30, which directs them to be assigned out of the king's sworn justices, associating to themselves one or two discreet knights of each county. [58]

The judges upon their circuits now sit by virtue of five several authorities. I. The commission of the *peace*. 2. A commission of *oyer* and *terminer*. 3. A commission of general *gaol-delivery*. The consideration of all which belongs properly to the subsequent book of these Commentaries. [59] 4. A commission of *assize* directed to the justices and serjeants therein named, to take (together with their associates) assizes in the several counties; that is, to take the verdict of a peculiar species of jury called an assize, and summoned for the trial of *landed* disputes, of which hereafter. 5. That of *nisi prius*, which is a consequence of the commission of *assize*, being annexed to the office of those justices by the statute of Westm. 2, 13 Edw. I. c. 30, and it empowers them to try all questions of fact issuing out of the courts of Westminster, that are then ripe for trial by jury. These by the course of the courts are usually appointed to be tried at Westminster in some Easter or Michaelmas term, by a jury returned from the county wherein the cause of action arises; but with this proviso, **nisi prius**, *unless before* the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas term, which saves much expense and trouble.[4]

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4. The judicial system of the states consists under different names, of (1) Inferior courts not of record called courts of justices of the peace, whose jurisdiction is conferred and limited by statute and varies somewhat in the different states. The federal jurisdiction has no corresponding court.

(2) County courts, probate courts, etc. County courts sometimes have a limited common law jurisdiction.

(3) Circuit or district courts of both general common law and equity jurisdiction. These are our courts of *nisi prius*. In New Jersey and Tennessee, and perhaps other states, there are separate chancery courts.

(4) In some of the states, as in Illinois, there are intermediate appellate courts, having no original jurisdiction.

(5) Supreme courts having only appellate jurisdiction except in a few special cases. Besides these there are frequently in large cities special city courts established by statute, as superior courts, criminal courts, municipal courts, probate courts, etc.

"The judicial power of the United States shall be vested in one Supreme

CHAPTER V.

OF COURTS ECCLESIASTICAL, MILITARY, AND MARITIME.

[See the Supreme Court of Judicature Act, already referred to.]

I. [The different species of ecclesiastical courts in our author's time, beginning with the lowest, were (1) **the Archdeacon's Court**; (2) **the Consistory Court** of every diocesan bishop; (3) **the Court of Arches**; (4) **the Court of Peculiars**; (5) **the Prerogative Court**; (6) **the Court of Delegates**; and sometimes (7) **a Commission of Review**; none of which were courts of record. For particulars see the text, p. 61 *et seq.*]

II. Next, as to the **courts military.** [68] The only court of this kind known to and established by the permanent laws of the land is **the Court of Chivalry.** [Now obsolete.]

III. **The Maritime Courts,** or such as have power and jurisdiction to determine all maritime injuries arising upon the seas or in parts out of the reach of the common law, **are only the Court of Admiralty and its courts of appeal.** [69] The Court of Admiralty is held before the Lord High Admiral of England or his deputy, who is called the judge of the court.[1] According to Sir Henry Spelman and Lambard it was first of all erected by King Edward III. Its proceedings are, according to the method of the civil law, like those of the ecclesiastical courts, upon which account it is usually held at the same place with the superior ecclesiastical courts, at Doctor's Commons in London. It is no court of record any more than the spiritual courts.

Court and in such inferior courts as the Congress may from time to time ordain and establish." U. S. Const., art. 3, sec. 1.

At the present time (1914) this judicial power is exercised by (1) the United States District Court, which is the court of original jurisdiction or *nisi prius* court.

(2) The appellate jurisdiction is exercised by the Circuit Courts of Appeal; and

(3) The Supreme Court of the United States.

(4) Besides these there are the court of claims, the court of customs appeal, the commerce court, the courts of the District of Columbia and the territorial courts.

For details as to the distributions and method of exercise of this jurisdiction, consult Hughes' Federal Procedure (2d Ed.), chs. 2, 11 and 21.

1. This jurisdiction is with us vested in the United States District Court, which is a court of record.

CHAPTER VI.

OF COURTS OF A SPECIAL JURISDICTION.

[These courts, whose jurisdiction was private and special, confined to particular spots or instituted only to redress particular injuries, were the following: (1) **Forest courts**; (2) **the Court of Commissioners of Sewers**; (3) **the Court of Policies of Insurance**; (4) **the Court of Marshalsea and the Palace-Court at Westminster**; (5) **The courts of the Principality of Wales**; (6) **the Court of the Duchy Chamber of Lancaster**; (7) **the courts appertaining to the Counties Palatine of Chester, Lancaster, and Durham, and the royal franchise of Ely**; (8) **the Stannary courts in Devonshire and Cornwall**; (9) **the several courts held within the City of London, and other cities, &c., by prescription, &c.**; and (10) **the Chancellor's courts in the two Universities**; for particulars as to which see the text, p. 71 *et seq.*]

CHAPTER VII.

OF THE COGNIZANCE OF PRIVATE WRONGS.

The common law of England[1] **is the one uniform rule to determine the jurisdiction of our courts,** and if any tribunals whatsoever attempt to exceed the limits so prescribed them, the king's courts of common law may and do prohibit them, and in some cases punish their judges. [87]

Having premised this general caution, I proceed now to consider, —

I. **The wrongs or injuries cognizable by the ecclesiastical courts.** I mean such as are offered to private persons or individuals which are cognizable by the ecclesiastical court, not for reformation of the offender himself or party *injuring* (*pro salute animae,*[2] as is the case with immoralities in general when unconnected with private injuries), but for the sake of the party *injured,* to make him a satisfaction and redress for the damage which he has sustained. [88] And these I shall reduce under three general heads: of **causes pecuniary, causes matrimonial,** and **causes testamentary.**

1. **Pecuniary causes** cognizable in the ecclesiastical courts are such as arise either from the withholding ecclesiastical dues, or the doing or neglecting some act relating to the church whereby some damage accrues to the plaintiff, towards obtaining a satisfaction for which he is permitted to institute a suit in the spiritual court [such are the subtraction or withholding of *tithes* from the parson or vicar, the non-payment of other ecclesiastical dues to the clergy, spoliation, and dilapidation, which is a kind of ecclesiastical waste].

2. **Matrimonial causes,** or injuries respecting the rights of marriage, are another branch of the ecclesiastical jurisdiction. [92]

Of matrimonial causes, one of the first and principal is,—

(1) **Causa jactitationis matrimonii,**[3] when one of the parties boasts or gives out that he or she is married to the other, whereby a common

1. As modified by statute.
2. For the safety of his soul.
3. By reason of boasting of marriage.

reputation of their matrimony may ensue. On this ground the party injured may libel the other in the spiritual court, and, unless the defendant undertakes and makes out a proof of the actual marriage, he or she is enjoined perpetual silence upon that head, which is the only remedy the ecclesiastical courts can give for this injury. (2) Another species of matrimonial causes was when a party contracted to another brought **a suit in the ecclesiastical court to compel a celebration of the marriage** in pursuance of such contract; but this branch of causes is now cut off entirely by the act for preventing clandestine marriages, 26 Geo. II. c. 33, which enacts that for the future no suit shall be had in any ecclesiastical court to compel a celebration of marriage *in facie ecclesiae*, for or because of any *contract* of matrimony whatsoever. [94] (3) **The suit for restitution of conjugal rights** is also another species of matrimonial causes, which is brought whenever either the husband or wife is guilty of the injury of subtraction, or lives separate from the other without any sufficient reason; in which case the ecclesiastical jurisdiction will compel them to come together again if either party be weak enough to desire it, contrary to the inclination of the other.

(4) **Divorces** also, of which and their several distinctions we treated at large in a former book, are causes thoroughly matrimonial, and cognizable by the ecclesiastical judge.[4] If it becomes improper, through some supervenient cause arising *ex post facto*, that the parties should live together any longer, as though intolerable cruelty, adultery, a perpetual disease, and the like, this unfitness or inability for the marriage state may be looked upon as an injury to the suffering party, and for this the ecclesiastical law administers the remedy of separation, or a **divorce a mensa et thoro.**[5] But if the cause existed previous to the marriage, and was such a one as rendered the marriage unlawful *ab initio*, as consanguinity, corporal imbecility, or the like, in this case the law looks upon the marriage to have been always null and void, being contracted *in fraudem legis*, and decrees not only a separation from bed and board, but **a vinculo matrimonii**[6] itself. (5) The last species of matrimonial causes is a consequence drawn from one of the species of divorce, that *a mensa et thoro*, which is the **suit**

4. This jurisdiction is, in the United States, usually exercised by courts of equitable jurisdiction, such as circuit courts, district courts, etc.

5. From bed and board.

6. From the bonds of matrimony. See Divorce, considered *ante*.

for alimony, a term which signifies maintenance; which suit the wife, in case of separation, may have against her husband if he neglects or refuses to make her an allowance suitable to their station in life. This is an injury to the wife, and the court Christian will redress it by assigning her a competent maintenance, and compelling the husband by ecclesiastical censures to pay it. But no alimony will be assigned in case of a divorce for adultery on her part; for as that amounts to a forfeiture of her dower after his death, it is also a sufficient reason why she should not be partaker of his estate when living. [95]

3. **Testamentary causes** are the only remaining species belonging to the ecclesiastical jurisdiction.[7] This jurisdiction is principally exercised with us in the consistory courts of every diocesan bishop, and in the prerogative court of the metropolitan originally, and in the arches court and court of delegates by way of appeal. [98] It is divisible into three branches: **the probate of wills, the granting of administrations**, and **the suing for legacies**; the two former of which, when no opposition is made, are granted merely *ex officio et debito justitiae*,[8] and are then the object of what is called the *voluntary*, and not the *contentious* jurisdiction. But when a *caveat*[9] is entered against proving the will or granting administration, and a suit thereupon follows to determine either the validity of the testament or who hath a right to administer, this claim and obstruction by the adverse party are an injury to the party entitled, and as such are remedied by the sentence of the spiritual court, either by establishing the will or granting the administration. Subtraction, the withholding or detaining of legacies, is also still more apparently injurious, by depriving the legatees of that right with which the laws of the land and the will of the deceased have invested them; and therefore, as a consequential part of testamentary jurisdiction, the spiritual court administers redress herein by compelling the executor to pay them. But in this last case the

7. This jurisdiction is, in the United States, usually vested in what are called probate courts, orphans' courts, surrogates' courts, or county courts.

8. Out of duty and as a debt to justice.

9. Beware.

courts of equity exercise a concurrent jurisdiction with the ecclesiastical courts as incident to some other species of relief prayed by the complainant: as to compel the executor to account for the testator's effects, or assent to the legacy, or the like. For as it is beneath the dignity of the king's courts to be merely ancillary to other inferior jurisdictions, the cause when once brought there receives there also its full determination.

The proceedings in the ecclesiastical courts are regulated according to the practice of the civil and canon laws, or rather according to a mixture of both, corrected and new modelled by their own particular usages and the interposition of the courts of common law.[1] [100] Their ordinary course of proceeding is: first, by **citation,** to call the party injuring before them. Then, by **libel,** *libellus,* a little book, or by articles drawn out in a formal *allegation,* to set forth the complainant's ground of complaint. To this succeeds the **defendant's answer upon oath,** when, if he denies or extenuates the charge, they proceed to **proofs** by witnesses examined, and their depositions taken down in writing by an officer of the court. If the defendant has any circumstances to offer in his defence he must also propound them in what is called his **defensive allegation,** to which he is entitled in his turn to the **plaintiff's answer upon oath,** and may from hence proceed to **proofs** as well as his antagonist. When all the pleadings and proofs are concluded, they are referred to the consideration, not of a jury, but of a single judge, who **takes information** by hearing advocates on both sides, and thereupon forms his **interlocutory decree** or **definitive sentence** at his own discretion, from which there generally lies an **appeal.**[2] [101]

The point in which these jurisdictions are the most defective is that of enforcing their sentences when pronounced, for which they have no other process but that of **excommunication,** which is described to be twofold, the less, and the greater excommunication. The less is an ecclesiastical censure excluding the party from the participation of the sacraments, the greater proceeds farther, and excludes him not only from

1. See local statutes and books of practice.

2. See local statutes and books of practice.

these, but also from the company of all Christians. With us by the common law an excommunicated person is disabled to do any act that is required to be done by one that is *probus et legalis homo*.[3] [102] He cannot serve upon juries, cannot be a witness in any court, and, which is the worst of all, cannot bring an action, either real or personal, to recover lands or money due to him. Nor is this the whole, for if, within forty days after the sentence has been published in the church, the offender does not submit and abide by the sentence of the spiritual court, the bishop may certify such contempt to the king in Chancery. Upon which there issues out a writ to the sheriff of the county, called, from the bishop's certificates, a *significavit*,[4] or, from its effects, a writ *de excommunicato capiendo*,[5] and the sheriff shall thereupon take the offender and imprison him in the county gaol till he is reconciled to the church, and such reconciliation certified by the bishop, under which another writ, *de excommunicato deliberando*,[6] issues out of Chancery to deliver and release him.

II. I am next to consider the injuries cognizable in the **court military,** or court of *chivalry* [103], the jurisdiction of which is declared by statute 13 Ric. II. c. 2, to be this: "that it hath cognizance of contracts touching deeds of arms or of war out of the realm, and also of things which touch war within the realm, which cannot be determined or discussed by the common law, together with other usages and customs to the same matters appertaining." So that wherever the common law can give redress this court hath no jurisdiction, which has thrown it entirely out of use as to the matter of contracts, all such being usually cognizable in the courts of Westminster Hall, if not directly, at least by fiction of law; as if a contract be made at Gibraltar, the plaintiff may suppose it made at Northampton; for the locality, or place of making it, is of no consequence with regard to the validity of the contract.

The words "other usages and customs" support the claim of this court: 1. To give relief to such of the nobility and gentry as think themselves aggrieved in matters of honor, and 2. To keep up the distinction of degrees and quality. [104] Whence it follows that the civil jurisdiction of this court of chivalry is principally in two points: the redressing injuries of honor, and correcting encroachments in matters of coat-armor, precedency, and other distinctions of families. [Obsolete.]

III. Injuries cognizable by the **courts maritime, or admiralty courts.**[7] [106] These courts have jurisdiction and power to try and determine all maritime causes, or such

3. Good and lawful man.
4. He signified.
5. For taking one excommunicated.
6. For liberating one excommunicated.
7. In the United States this jurisdiction is vested in the district courts of the United States.

injuries which, though they are in their nature of common law cognizance, yet, being committed on the high seas, out of the reach of our ordinary courts of justice, are therefore to be remedied in a peculiar court of their own. All admiralty causes must be therefore causes arising wholly upon the sea, and not within the precincts of any country. If part of any contract or other cause of action doth arise upon the sea and part upon the land, the common law excludes the admiralty court from its jurisdiction; for part belonging properly to one cognizance and part to another, the common or general law takes place of the particular. Therefore, though pure maritime acquisitions, which are earned and become due on the high seas, as **seamen's wages**, are one proper object of the admiralty jurisdiction, even though the contract for them be made upon land, yet, in general, if there be a contract made in England and to be executed upon the seas,— as a charter-party or covenant that a ship shall sail to Jamaica, or shall be in such a latitude by such a day; or a contract made upon the sea to be performed in England, as a bond made on shipboard to pay money in London or the like,— these kinds of mixed contracts belong not to the admiralty jurisdiction, but to the courts of common law.[8] [107]

And also, as the courts of common law have obtained a concurrent jurisdiction with the court of chivalry with regard to foreign contracts, by supposing them made in England, so it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at the Royal Exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall.

Where the admiral's court hath not original jurisdiction of the cause, though there should arise in it a question that is proper for the cognizance of that court, yet that doth not alter nor take away the exclusive jurisdiction of the common law. [108] And so *vice versa,* if it hath jurisdiction of the original, it hath also jurisdiction of all consequen-

8. See, generally, Benedict's Admiralty (4th Ed., 1910).

tial questions, though properly determinable at common law. In case of prizes in time of war between our own nation and another, which are taken at sea and brought into our ports, the courts of admiralty have an undisturbed and exclusive jurisdiction to determine the same according to the law of nations.[8a]

The proceedings of the courts of admiralty bear much resemblance to those of the civil law,[9] but are not entirely founded thereon, and they likewise adopt and make use of other laws as occasion requires, such as the Rhodian laws and the laws of Oleron. The first process in these courts is frequently by arrest of the defendant's person, and they also take recognizances or stipulations of certain fidejussors in the natrue of bail, and in case of default may imprison both them and their principal. [109] They may also fine and imprison for a contempt in the face of the court. And all this is supported by immemorial usage grounded on the necessity of supporting a jurisdiction so extensive, though opposite to the usual doctrines of the common law; these being no courts of record, because in general their process is much conformed to that of the civil law.

IV. **Such injuries as are cognizable by the courts of the common law.** And herein I shall for the present only remark that all possible injuries whatsoever that did not fall within the exclusive cognizance of either the ecclesiastical, military [equitable], or maritime tribunals are for that very reason within the cognizance of the common-law courts of justice. For it is a settled and invariable principle in the laws of England that every right when withheld must have a remedy, and every injury its proper redress. But before we conclude the present chapter I shall just mention two species of injuries which will properly fall now within our immediate consideration, and which are, either **when justice is delayed by an inferior court** that has proper cognizance of the cause, or **when such inferior court takes upon itself to examine a cause and decide the merits without a legal authority.**

8a. This jurisdiction, in the United States, is vested in the United States District Courts.

9. See, generally, Benedict's Admiralty (4th Ed.), an excellent work of very moderate size.

1. The first of these injuries, refusal or neglect of justice, is remedied either by writ of *procedendo* or of *mandamus*. **A writ of procedendo ad judicium**[1] issues out of the Court of Chancery, where judges of any subordinate court do delay the parties, for that they will not give judgment, either on the one side or the other, when they ought so to do. In this case a writ of *procedendo* shall be awarded, commanding them in the king's name to proceed to judgment, but without specifying any particular judgment, for that (if erroneous) may be set aside in the course of appeal, or by writ of error or false judgment; and upon further neglect or refusal, the judges of the inferior court may be punished for their contempt, by writ of attachment returnable in the King's Bench or Common Pleas. [110]

A writ of mandamus is in general a command issuing in the king's name from the Court of King's Bench, and directed to any person, corporation, or inferior court of judicature within the king's dominions, requiring them to do some *particular* thing therein specified which appertains to their office and duty, and which the Court of King's Bench has previously determined, or at least supposes, to be consonant to right and justice. It is a high prerogative writ, of a most extensively remedial nature, and may be issued in some cases where the injured party has also another more tedious method of redress, as in the case of admission or restitution of an office; but it issues in all cases where the party hath a right to have anything done, and hath no other specific means of compelling its performance.[2] At present

1. For proceeding to judgment.

In Illinois a certified copy of the order of the upper court affirming or dismissing an appeal, when filed in the trial court, operates as a *procedendo*. Smith v. Stevens, 133 Ill. 183; Rev. Stat. Ill., ch. 110, sec. 83. See Tidd's Practice, *Procedendo;* see *Mandamus*.

2. Rex v. Barker, Burr., 1267, per Lord Mansfield; 2 Spelling's Extraordinary Relief, § 1363; High's Extraor. Legal Rem., § 1. It is strictly a legal remedy with which equity has nothing to do. 2 Spelling's Extraor. Relief, § 1163; Gay v. Gilmore, 76 Geo. 725.

This writ is used at the present day, as at first, to give relief where ordinary legal procedure by reason of its defects gives none. 2 Spelling, § 1165. The jurisdiction of courts in administering this remedy as well as the manner of its employment have been greatly modified in many states by statute. But the well-established rules of the common law governing

we are particularly to remark that it issues to the judges of any inferior court commanding them to do justice according to the powers of their office, whenever the same is delayed. A *mandamus* may therefore be had to the courts of the City of London to enter up judgment, to the spiritual courts to grant an administration, to swear a churchwarden, and the like. [111] This writ is grounded on a suggestion, by the oath of the party injured, of his own right and the denial of justice below, whereupon a **rule** is made (except in some general cases, where the probable ground is manifest) directing the party complained of to show cause why a writ of *mandamus* should not issue; and if he shows no sufficient cause, the writ itself is issued, at first in the **alternative**, either to do thus or signify some reason to the contrary, to which a return or answer must be made at a certain day. And if the inferior judge, or other person to whom the writ is directed, returns or signifies an insufficient reason, then there issues in the second place a **peremptory mandamus** to do the thing absolutely, to which no other return will be admitted but a certificate of perfect obedience and due execution of the writ.[3] If the inferior judge or other person makes no return or fails in his respect and obedience, he is punishable for his contempt by attachment. But if he at the first returns a sufficient cause, although it should be false in fact, the Court of King's Bench will not try the truth of the fact upon affidavits, but will for the present believe him and proceed no farther on the *mandamus*. But then the party injured may have an **action against him for his false return**, and (if found to be false by the jury) shall recover damages equivalent to the injury

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the jurisdiction are generally adhered to in all cases where such rules are applicable. Relief will be refused when no other adequate remedy is provided by law. 2 Spelling's Extraor. Relief, § 1366. In some of the states the jurisdiction is occasionally exercised by courts of last resort, but usually by courts of general common law jurisdiction. 2 Spelling's Extraor. Relief, § 1367.

3. The practice in this proceeding so far as we have seen it in this country, very much resembles that at common law, though as a rule simplified. See local works on Practice. See generally, 2 Spelling's Ex. Rel. title Mandamus; High, Extraor. Legal Remedies.

sustained, together with a *peremptory mandamus* to the defendant to do his duty.

2. **A prohibition** is a writ issuing properly out of the Court of King's Bench, being the king's prerogative writ; but for the furtherance of justice it may now also be had in some cases out of the Court of Chancery, Common Pleas, or Exchequer, directed to the judge and parties of a suit in any inferor court [or tribunal], commanding them to cease from the prosecution thereof, upon a suggestion that either the cause originally, or some collateral matter arising therein, does not belong to that jurisdiction, but to the cognizance of some other court.[4] [112] And if either the judge or the party shall proceed after such prohibition, an attachment may be had against them to punish them for the contempt, at the discretion of the court that awarded it, and an action will lie against them to repair the party injured in damages. [113]

A short summary of the **method of proceeding upon prohibitions**[5] is as follows: The party aggrieved in the court

4. It is an extraordinary writ because it issues only when the party seeking is without other adequate means of redress for the wrong about to be inflicted by the act of the inferior tribunal. It lies only, however, where there is about to be an excess or jurisdiction as to person or subject-matter or in the enforcement of rulings in a manner or by means not intrusted to the judgment or discretion of the acting tribunal. 2 Spelling's Extraor. Rel., § 1716 and cases cited.

5. So far as we have observed there has been little legislation upon the subject of prohibition. In Ilinois the writ of prohibition is governed by chapter 7 of the Revised Statutes on Amendments and Jeofails (see ch. 7, sec. 9), and the plaintiff obtaining judgment recovers his costs; and there is, so far as we can find, no other legislation in Ilinois on the subject. We apprehend that, in general, upon making a sufficient *prima facie* showing by petition or affidavit, a rule on the inferior tribunal to show cause why the writ should not be issued, is the first step; this rule will, meanwhile, have the effect of a prohibition until discharged. Upon the hearing of this rule the writ of prohibition will be denied or granted. See, generally, 2 Spelling's Extraor. Relief, Part 2, ch. 16, secc. 1757 *et seq.*; Com. Dig. tit. Prohibition; Bac. Ab. tit. Prohibition; 2 Saund. index, tit. Prohibition; and see an excellent illustration of the nature and object of this proceeding, given by the court in 2 Hen. Bla. 553. Also, consult the local statutes and books on practice. In most works on practice, however, the name of the writ is not even mentioned. The student who wishes to

below applies to the superior court, setting forth in a suggestion upon record the nature and cause of his complaint in being drawn *ad aliud examen*[6] by a jurisdiction or manner of process disallowed by the laws of the kingdom; upon which, if the matter alleged appears to the court to be sufficient, the writ of prohibition immediately issues, commanding the judge not to hold, and the party not to prosecute, the plea. But sometimes the point may be too nice and doubtful to be decided merely upon a motion, and then, for the more solemn determination of the question, the party applying for the prohibition is directed by the court to *declare* a prohibition, that is, to prosecute an action by filing a declaration against the other upon a supposition or fiction (which is not traversable) that he has proceeded in the suit below, notwithstanding the writ of prohibition. And if, upon demurrer and argument, the court shall finally be of opinion that the matter suggested is a good and sufficient ground of prohibition in point of law, then judgment with nominal damages shall be given for the party complaining, and the defendant and also the inferior court shall be prohibited from proceeding any farther. [114] On the other hand, if the superior court shall think it no competent ground for restraining the inferior jurisdiction, then judgment shall be given against him who applied for the prohibition in the court above, and a writ of *consultation* shall be awarded,— so called because, upon deliberation and consultation had, the judges find the prohibition to be ill-founded, and therefore by this writ they return the cause to its original jurisdiction, to be there determined in the inferior court. And even in ordinary cases the writ of prohibition is not absolutely final and conclusive. For though the ground be a proper one in point of *law* for granting the prohibition, yet if the *fact* that give rise to it be afterwards falsified the cause shall be remanded to the prior jurisdiction.

know the old practice on this writ is referred to 6 Wentworth's Pleading, pp. 242-304 (Dublin, 1799), where the common law precedents and practice will be found stated at length.

6. To another examination.

CHAPTER VIII.

OF WRONGS AND THEIR REMEDIES, RESPECTING THE RIGHTS OF PERSONS.

Since all wrongs may be considered as merely a privation of right, **the plain natural remedy for every species of wrong is the being put in possession of that right whereof the party injured is deprived.** [116] This may either be effected by a specific delivery or restoration of the subject-matter in dispute to the legal owner, as when lands or personal chattels are unjustly withheld or invaded; or, where that is not a possible, or at least not an adequate remedy, by making the sufferer a pecuniary satisfaction in damages, as in case of assault, breach of contract, &c., to which damages the party injured has acquired an incomplete or inchoate right the instant he receives the injury, though such right be not fully ascertained till they are assessed by the intervention of the law. **The instruments whereby this remedy is obtained are a diversity of suits and actions,** which are defined by the mirror to be "the lawful demand of one's right;" or, as Bracton and Fleta express it, in the words of Justinian, *jus persequendi in judicio quod alicui debetur.*[1]

With us in England the several suits, or remedial instruments of justice, are from the subject of them distinguished into three kinds: actions, *personal, real,* and *mixed.* [117]

Personal actions are such whereby a man claims a debt or personal duty, or damages in lieu thereof; and, likewise, whereby a man claims a satisfaction in damages for some injury done to his person or property. The former are said to be **founded on contracts,**[2] the latter **upon torts**[3] or wrongs. Of the former nature are all actions upon debt or promises; of the latter all actions for trespass, nuisances, assaults, defamatory words, and the like.

Real actions[4] (or, as they are called in the mirror, *feodal*

1. The right of prosecuting in judgment what is due to every one.
2. *Ex contractu.*
3. *Ex delicto.*
4. Real actions, properly so-called, are obsolete.

actions), which concern real property only, are such whereby the plaintiff, here called the demandant, claims title to have any lands or tenements, rents, commons, or other hereditaments, in fee-simple, fee-tail, or for term of life. [118] By these actions formerly all disputes concerning real estates were decided; but they are now pretty generally laid aside in practice, upon account of the great nicety required in their management, and the inconvenient length of their process,— a much more expeditious method of trying titles being since introduced by other actions personal and mixed.

Mixed actions[5] are suits partaking of the nature of the other two, wherein some real property is demanded, and also personal damages for a wrong sustained; as, for instance, an action of waste, which is brought by him who hath the inheritance in remainder or reversion against the tenant for life who hath committed waste therein, to recover not only the land wasted, which would make it merely a *real* action, but also treble damages, in pursuance of the statute of Gloucester, which is a *personal* recompense; and so both, being joined together, denominate it a *mixed* action.

All civil injuries are of two kinds: the one **without force** or violence, as slander or breach of contract; the other coupled **with force** and violence, as batteries or false imprisonment. And this distinction of private wrongs into injuries *with* and *without* force we shall find to run through all the variety of which we are now to treat.[6] [119] As we divide all rights into those of *persons* and those of *things*, so we must make the same general distribution of injuries into such as affect the *rights of persons* and such as affect the *rights of property*.

I. **As to injuries which affect the personal security of individuals**, they are either injuries against their lives, their limbs, their bodies, their health, or their reputations.[7]

5. In states where the common law forms of actions have been retained, as in Illinois and Michigan, the mixed action of ejectment, modified by statute, is still retained. This subject will be considered further on.

6. This distinction still prevails.

7. See the following topics more fully discussed in vol. 2 of this series.

1. **Injuries affecting the life of man** do not fall under our present contemplation,[8] being one of the most atrocious species of crimes, the subject of the next book of our Commentaries.

2, 3. **Injuries affecting the limbs or bodies of individuals** may be committed: 1. By **threats and menaces of bodily hurt,** through fear of which a man's business is interrupted. [120] A menace alone, without a consequent inconvenience, makes not the injury; but to complete the wrong there must be both of them together. The remedy for this is in pecuniary damages, to be recovered by **action of trespass vi et armis,**[9] this being an inchoate, though not an absolute violence. 2. **By assault, which is an attempt or offer to beat another without touching him,** as if one lifts up his cane or his fist in a threatening manner at another, or strikes at him but misses him, this is an assault.[1] This also is an inchoate violence, amounting considerably higher than bare threats; and therefore, though no actual suffering is proved, yet the party injured may have redress by **action of trespass vi et armis,** wherein he shall recover damages as a compensation for the injury. 3. **By battery, which is the unlawful beating of another.** The least touching of another's person wilfully or in anger is a battery. But battery is in some cases justifiable or lawful, as where one who hath authority, a parent or master, gives moderate correction to his child, his scholar, or his apprentice. So, also, on the principle of self-defence; for if one strikes me

8. At common law no civil action lay for causing the death of a human being. Cooley on Torts (Students' Ed.), 270; Hale on Torts, 184. To remedy this defect of the common law the British parliament, in 1846, passed an act commonly known as Lord Campbell's act, giving a remedy in cases of death caused by wrongful act, neglect on default in such cases as would (had death not ensued) have entitled the party injured to maintain an action for damages. Similar statutes have been passed in most, if not all, the states. See Hale on Torts, 186-189; Cooley on Torts (Students' Ed.), 271-288 and cases cited.

9. With force and arms.

1. Every assault and assault and battery are at once both a civil wrong and a crime against the state. The civil wrong is redressed by the action of trespass; the crime is an offence against the state and will be considered in Book 4, where assault and assault and battery are more fully considered.

first, or even only assaults me, I may strike in my own defence, and if sued for it may plead *son assault demesne*,[2] or that it was the plaintiff's own original assault that occasioned it. So, likewise, in defence of my goods or possession, if a man endeavors to deprive me of them I may justify laying hands upon him to prevent him; and in case he persists with violence, I may proceed to beat him away. [121] Thus, too, in the exercise of an office, as that of churchwarden or beadle, a man may lay hands upon another to turn him out of church, and prevent his disturbing the congregation. And if sued for this or the like battery, he may set forth the whole case, and plead that he laid hands upon him gently, **molliter manus imposuit**, for this purpose. On account of these causes of justification, battery is defined to be the *unlawful* beating of another; for which the remedy is, as for assault, by action of *trespass vi et armis*, wherein the jury will give adequate damages. 4. **By wounding**, which consists in giving another some dangerous hurt, and is only an aggravated species of battery. 5. **By mayhem**, which is an injury still more atrocious, and consists in violently depriving another of the use of a member proper for his defence in fight. This is a battery, attended with this aggravating circumstance, that thereby the party injured is forever disabled from making so good a defence against future external injuries as he otherwise might have done. Among these defensive members are reckoned not only arms and legs, but a finger, an eye, and a fore-tooth, and also some others. But the loss of one of the jaw-teeth, the ear, or the nose, is no mayhem at common law, as they can be of no use in fighting. The same remedial **action of trespass vi et armis** lies also to recover damages for this injury,— an injury which (when wilful) no motive can justify but necessary self-preservation.[3] If the ear be cut off,

2. His own first assault.

3. The action of trespass is still in force in those states where common law pleading has been preserved as in Michigan and Illinois. It lies for the recovery of damages for a direct injury accompanied by force. See *post*, chapter 12, also vol. 2 of this series. In those states where the common law forms of actions have been abolished by statute, the injury of trespass still exists as described in the text, but is redressed by another form of proceeding. Otherwise,

treble damages are given by statute 37 Hen. VIII. c. 6, though this is not mayhem at common law. And here I must observe that for these four last injuries, assault, battery, wounding, and mayhem, an **indictment** may be brought as well as an action.[4]

4. **Injuries affecting a man's health** are where, by any unwholesome practices of another, a man sustains any apparent damage in his vigor or constitution. [122] As by selling him bad provisions or wine, by the exercise of a noisome trade, which infects the air in his neighborhood; or by the neglect or unskilful management of his physician, surgeon, or apothecary. These are wrongs or injuries unaccompanied by force, for which there is a remedy in damages by **a special action of trespass upon the case.** This action of *trespass*, or transgression *on the case*, is an universal remedy given for all personal wrongs and injuries without force, so called because the plaintiff's whole case or cause of complaint is set forth at length in the original writ. For though in general there are methods prescribed and forms of actions previously settled for redressing those wrongs which most usually occur, and in which the very act itself is immediately prejudicial or injurious to the plaintiff's person or property, as battery, non-payment of debts, detaining one's goods, or the like, yet where any special consequential damage arises which could not be foreseen and provided for in the ordinary course of justice, the party injured is allowed, both by common law and the statute of Westm. 2, c. 24, to bring a special action on his own case by a writ formed according to the peculiar circumstances of his own particular grievance. [123] For wherever the common law gives a right or prohibits an injury, it also gives a remedy by action, and, therefore, wherever a new injury is done, a new method of remedy must be pursued. **And it is a settled distinction that where an act is done which is in itself an immediate injury to another's person or property, there the remedy is usually by an action of trespass vi et armis; but where there is no act**

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the same rules of law apply in full force.

4. See Book 4.

done, but only a culpable omission, or where the act is not immediately injurious, but only by consequence and collaterally, there no action of trespass vi et armis will lie, but an action on the special case, for the damages consequent on such omission or act.[5]

5. Lastly, **injuries affecting a man's reputation** or good name are, first, by malicious, scandalous, and slanderous *words*, tending to his damage and derogation. **As if a man maliciously and falsely utter any slander** or false tale of another, **which may either endanger him in law, by impeaching him of some heinous crime,** as to say that a man hath poisoned another, or is perjured, **or which may exclude him from society, as to charge him with having an infectious disease, or which may impair or hurt his trade or livelihood,** as to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave.

Words spoken in derogation of a peer, a judge, or other officer of the realm, which are called *scandalum magnatum*,[6] are held to be still more heinous; and though they be such as would not be actionable in the case of a common person, yet when spoken in disgrace of such high and respectable characters, they amount to an atrocious injury, which is redressed by an action on the case founded on many ancient statutes, as well on behalf of the crown to inflict the punishment of imprisonment on the slanderer, as on behalf of the party to recover damages for the injury sustained. [124] [Not applicable to this country.]

Words also tending to scandalize a magistrate or person in a public trust are reputed more highly injurious than when spoken of a private man. It is said that formerly no actions were brought for words unless the slander was such as (if true) would endanger the life of the object of it. But it is now held that for scandalous words of the several species before mentioned (that may endanger a man by subjecting him to the penalties of the law, may exclude him from society, may impair his trade, or may affect a peer of the realm, a magistrate, or one in public trust), an

5. This action is still in use in Michigan, Illinois and other states. It lies, as stated, to recover damages for an indirect injury or one not accompanied by force. See vol. 2 of this series.

6. Gross scandal.

action on the case be had **without proving any particular damage** to have happened, but merely upon the probability that it might happen.[7] But with regard to words that do not thus apparently, and upon the face of them, import such defamation as will of course be injurious, it is necessary that the plaintiff should aver some particular damage to have happened which is called laying his action with a *per quod*. As if I say that such a clergyman is a bastard, he cannot for this bring any action against me unless he can show some special loss by it; in which case he may bring his action against me for saying he was a bastard, *per quod* he lost the presentation to such a living. In like manner to **slander another man's title** by spreading such injurious reports as, if true, would deprive him of his estate (as to call the issue in tail, or one who hath land by descent, a bastard), is actionable, provided any special damage accrues to the proprietor thereby, as if he loses an opportunity of selling the land. But **mere scurrility, or opprobrious words,** which neither in themselves import, nor are in fact attended with any injurious effects, will not support an action. So scandals which concern matters merely spiritual, as to call a man heretic or adulterer, are cognizable only in the ecclesiastical court, unless any temporal damages en-

7. Slanders are of two sorts: (1) those actionable *per se*, i. e., by themselves, without proof of actual damage; and (2) those actionable only on alleging and proving special damages. The case of Pollard v. Lyon, 91 U. S. 225 (per Clifford, J.), is usually cited to sustain this classification. In that case Mr. Justice Clifford, in classifying slanderous words, used the following language: "(1) Words falsely spoken of a person which impute to the party the commission of some criminal offence involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Words falsely spoken of a person which impute that the party is infected with some contagious disease, where, if the charge is true, it would exclude the party from society. (3) Defamatory words falsely spoken of a person which impute to the party unfitness to perform the duties of an office or employment of profit or the want of integrity in the discharge of the duties of such an office or employment. (4) Defamatory words falsely spoken of a party which prejudice such party in his or her profession or trade. (5) Defamatory words falsely spoken of a person which, though not in themselves actionable, occasion the party special damage." See, generally, Hale on Torts, 298; Cooley on Torts (Students' Ed.), 200 and cases cited.

sues, which may be a foundation for a *per quod*.[8] [125] Words of heat and passion, as to call a man a rogue and rascal, if productive of no ill consequence, and not of any of the dangerous species before mentioned, are not actionable; neither are words spoken in a friendly manner, as by way of advice, admonition, or concern, without any tincture or circumstance of ill-will; for in both these cases they are not **maliciously** spoken,[9] which is part of the definition of slander. Neither (as was formerly hinted) are any reflecting words made use of **in legal proceedings**, and pertinent to the cause in hand, a sufficient cause of action for slander.[1] **Also if the defendant be able to justify** and prove the words to be true, no action will lie, even though special damage hath ensued, for then it is no slander or false tale.

A second way of affecting a man's reputation is by printed or written libels, pictures, signs, and the like, which set him in an odious or ridiculous light, and thereby diminish his reputation. With regard to libels in general, there are, as in many other case, **two remedies, one by indictment, and the other by action.**[2] The former for the *public* offence; for every libel has a tendency to the breach of the peace, by provoking the person libelled to break it; which offence is the same (in point of law) whether the matter contained be true or false; and therefore the defendant, on an indictment for publishing a libel, is not allowed to allege **the truth** of it by way of justification. [126.] [Unless it

8. By which.

9. Malice, in a legal sense, means that the publication has been made without legal excuse. Cooley on Torts (Students' Ed.), 223.

1. As to privileged communications as a defence, see, generally, Cooley on Torts (Students' Ed.), 224-246; also vol. 2 of this series, title Torts.

2. See Book 4, Libel.

In libel as well as slander, publications are actionable *per se* or only actionable on averment and proof of special damage. The first class includes all cases actionable *per se* if made orally. It also embraces all other cases where the additional gravity imparted to the charge by the publication can be fairly supposed to make it damaging. In other words, any false and malicious writing published of another is libelous *per se* when its tendency is to render him contemptible or ridiculous in public estimation or expose him to public hatred or contempt or hinder virtuous men from associating with him. Cooley on Torts (Students' Ed.), 112 *et seq.*, where the cases are well collected and considered.

was also made with good motives and for justifiable ends.] But in the remedy by action on the case which is to repair the *party* in damages for the injury done him, the defendant may, as for words *spoken,* justify the truth of the facts, and show that the plaintiff has received no injury at all.[3] What was said with regard to words spoken will also hold in every particular with regard to libels by writing or printing, and the civil actions consequent thereupon; but as to signs or pictures, it seems necessary always to show, by proper *innuendos* and averments of the defendant's meaning, the import and application of the scandal, and that some special damage has followed, otherwise [i. e. without the innuendos], it cannot appear that such libel by picture was understood to be levelled at the plaintiff, or that it was attended with any actionable consequences.[4]

A third way of destroying or injuring a man's reputation is by preferring malicious indictments or prosecutions against him. For this, however, the law has given a very adequate remedy in damages, either by an action of *conspiracy,* which cannot be brought but against two at the least,[5] or, which is the more usual way, by **a special action on the case for a false and malicious prosecution.**[6]

In order to carry on the former (which gives a recompense for the danger to which the party has been exposed) it is necessary that the

3. The truth of the injurious charge is, when specially pleaded in justification, a defence to a civil action. Cooley on Torts (Students' Ed.), 221 and cases cited.

4. See preceding note as to special damages.

5. When a tort is committed in pursuance of a conspiracy, all the conspirators are jointly liable. Cooley on Torts (Students' Ed.), 85 and cases cited.

6. In order to sustain an action for a malicious prosecution the following circumstances must concur: 1. A suit or proceeding without probable cause. 2. The motive of the defendant in instituting it was malicious. 3. The prosecution has terminated in the acquittal or discharge of the accused. A conviction of the accused is conclusive proof of probable cause, unless obtained by fraud or unfair means. Cooley on Torts (Students' Ed.), 170, 176. Malice may be inferred from want of probable cause, but if probable cause exists, the existence of malice also is immaterial. Id., 180. Advice of counsel to bring the prosecution, given after a full and fair disclosure of all the material facts is a defence. Id., 173. See, generally, Hale on Torts, 349; Cooley on Torts (Students' Ed.), 170.

plaintiff should obtain a copy of the record of his indictment and acquittal; but in prosecutions for felony it is usual to deny a copy of the indictment, where there is any, the least probable cause to found such prosecution upon. For it would be a very great discouragement to the public justice of the kingdom if prosecutors who had a tolerable ground of suspicion were liable to be sued at law whenever their indictments miscarried.

But an action on the case for a malicious prosecution may be founded upon an indictment whereon no acquittal can be had, as if it be rejected by the grand jury, or be *coram non judice*, or be insufficiently drawn. [127] For it is not the danger of the plaintiff, but the scandal, vexation, and expense upon which this action is founded. However, any probable cause for preferring it is sufficient to justify the defendant.

II. We are next to consider the violation of the right of personal liberty. This is effected by the injury of false imprisonment.

To constitute the injury of false imprisonment there are two points requisite: 1. The detention of the person;[7] and **2. The unlawfulnes of such detention. Every confinement of the person is an imprisonment,** whether it be in a common prison, or in a private house, or in the stocks, or even by forcibly detaining one in the public streets. **Unlawful, or false, imprisonment consists in such confinement or detention without sufficient authority,** which authority may arise either from some process from the courts of justice, or from some warrant from a legal officer having power to commit, under his hand and seal, and expressing the cause of such commitment; or from some other special cause warranted, for the necessity of the thing, either by common law or act of parliament; such as the arresting of a felon by a private person without warrant, the impressing of mariners for the public service, or the apprehending of wagoners for misbehavior in the public highways.[8] False

7. *Prima facie* any restraint put by fear or force upon the actions of another is unlawful and constitutes a false imprisonment, unless a showing of justification makes it a true or legal imprisonment. The person need not be touched. Cooley on Torts (Students' Ed.), 158.

8. Restraint by those standing *in loco parentis* is often lawful with-

imprisonment also may arise by executing a lawful warrant or process at an unlawful time, as on a Sunday; for the statute hath declared that such service or process shall be void. [128] This is the injury. The remedy is of two sorts: the one *removing* the injury, the other *making satisfaction* for it.

The means of *removing* the actual injury of false imprisonment are fourfold. 1. By writ of *mainprize*. 2. By writ *de odio et atia*. 3. By writ *de homine replegiando*. 4. By writ of *habeas corpus*.

1. **The writ of mainprize,** *manucaptio*, is a writ directed to the sheriff (either generally, when any man is imprisoned for a bailable offence, and bail hath been refused, or specially, when the offence or cause of commitment is not properly bailable below), commanding him to take sureties for the prisoner's appearance, usually called *mainpernors*, and to set him at large. Mainpernors differ from bail in that a man's bail may imprison or surrender him up before the stipulated day of appearance; mainpernors can do neither, but are barely sureties for his appearance at the day. Bail are only sureties that the party be answerable for the special matter for which they stipulate; mainpernors are bound to produce him to answer all charges whatsoever.

2. **The writ de odio et atia** was anciently used to be directed to the sheriff, commanding him to inquire whether a prisoner charged with murder was committed upon just cause of suspicion, or merely *propter odium et atiam*, for hatred and ill-will; and if upon the inquisition due cause of suspicion did not appear, then there issued another writ for the sheriff to admit him to bail.

3. **The writ de homine replegiando** lies to replevy a man out of prison, or out of the custody of any private person (in the same manner that chattels taken in distress may be replevied), upon giving security to the sheriff that the man shall be forthcoming to answer any charge against him. [129]

The incapacity of these three remedies to give complete relief in every case hath almost entirely antiquated them, and hath caused a general recourse to be had, in behalf of persons aggrieved by illegal imprisonment, to

4. **The writ of habeas corpus,**[9] the most celebrated writ in the English law. Of this there are various kinds made

out legal process; so, also, in cases of the dangerous insane or other like case of necessity. Cooley on Torts (Students' Ed.), 159, 165.

9. Have the body.

use of by the courts at Westminster for removing prisoners from one court into another for the more easy administration of justice.

Such is the **habeas corpus ad respondendum,**[1] when a man hath a cause of action against one who is confined by the process of some inferior court, in order to remove the prisoner and charge him with this new action in the court above. Such is that **ad satisfaciendum,** when a prisoner hath had judgment against him in an action and the plaintiff is desirous to bring him up to some superior court to charge him with process of execution. [130] Such also are those **ad prosequendum, testificandum, deliberandum,**[2] etc., which issue when it is necessary to remove a prisoner, in order to prosecute or bear testimony in any court, or to be tried in the proper jurisdiction wherein the act was committed. Such is, lastly, the common writ **ad faciendum et recipiendum,**[3] which issues out of any of the courts of Westminster Hall when a person is sued in some inferior jurisdiction and is desirous to remove the action into the superior court, commanding the inferior judges to produce the body of the defendant, together with the day and cause of his caption and detainer (whence the writ is frequently denominated an *habeas corpus cum causa*)[4] to *do and receive* whatsoever the king's court shall consider in that behalf. This is a writ grantable of common right, without any motion in court, and it instantly supersedes all proceedings in the court below.

But the great and efficacious writ, in all manner of illegal confinement, is that of habeas corpus ad subjiciendum, directed to the person detaining another, and commanding him to produce the body of the prisoner, with the day and cause of his caption and detention, *ad faciendum, subjiciendum, et recipiendum,* to do, submit to, and receive whatsoever the judge or court awarding such writ shall consider in that behalf. [131] This is a high prerogative writ, and therefore by the common law issuing out of the Court of King's Bench [it also by statute issued out of the Courts of Common Pleas and Exchequer; it might also be issued by the Lord Chancellor in vacation] not only in term time, but also during the vacation, by a *fiat*[5] from the Chief Justice or any other of the judges, and running into all parts of

1. Have the body to respond.
2. To prosecute, testify, deliberate, etc.
3. To do and receive.
4. Have the body with the cause.
5. Order.

the king's dominions. If it issues in vacation, it is usually returnable before the judge himself who awarded it, and he proceeds by himself thereon, unless the term shall intervene, and then it may be returned in court.

In the King's Bench and Common Pleas it is necessary to apply for it by motion to the court, as in the case of all other prerogative writs (*certiorari,* prohibition, *mandamus,* &c.), which do not issue as of mere course, without showing some probable cause why the extraordinary power of the Crown is called in to the party's assistance. [132] On the other hand, if a probable ground be shown that the party is imprisoned without just cause, and therefore hath a right to be delivered, the writ of *habeas corpus* is then a writ of right, which "may not be denied, but ought to be granted to every man that is committed, or detained in prison, or otherwise restrained, though it be by the command of the king, the privy council, or any other." [133]

Early in the reign of Charles I. the Court of King's Bench, relying on some arbitrary precedents (and those perhaps misunderstood) determined that they could not upon an *habeas corpus* either bail or deliver a prisoner, though committed without any cause assigned, in case he was committed by the special command of the king or by the lords of the privy council. [134]

This drew on a parliamentary inquiry, and produced **the petition of right, 3 Car. I.,** which recites this illegal judgment, and enacts that no freeman hereafter shall be so imprisoned or detained.

But when, in the following year, Mr. Selden and others were committed by the lords of the council, in pursuance of his Majesty's special command, under a general charge of "notable contempts and stirring up sedition against the king and government," the judges delayed for two terms (including also the long vacation) to deliver an opinion how far such a charge was bailable. And when at length they agreed that it was, they however annexed a condition of finding sureties for the good behavior, which still protracted their imprisonment, the chief justice, Sir Nicholas Hyde, at the same time declaring that "if they were again remanded for that cause, perhaps the court would not afterwards grant a *habeas corpus,* being already made acquainted with the cause of the imprisonment."

These pitiful evasions gave rise to **the statute 16 Car. I. c. 10, § 8,** whereby it is enacted that if any person be committed by the king himself in person, or by his privy council, or by any of the members thereof, he shall have granted unto him, without any delay upon any pretence whatsoever, a writ of *habeas corpus,* upon demand or motion made to the Court of King's Bench *or Common Pleas,* who shall thereupon, within three court days after the return is made, examine and determine the legality of such commitment, and do what to justice shall appertain, in delivering, bailing, or remanding such prisoner. [135]

Yet still in the case of Jenks, who in 1676 was committed by the king in council for a turbulent speech at Guildhall, new shifts and devices were made use of to prevent his enlargement by law, the Chief Justice (as well as the Chancellor) declining to award a writ of *habeas corpus ad subjiciendum* in vacation, though at last he thought proper to award the usual writs *ad deliberandum,* etc., whereby the prisoner was discharged at the Old Bailey. Other abuses had also crept into daily practice, which had in some measure defeated the benefit of this great constitutional remedy. The party imprisoning was at liberty to delay his obedience to the first writ, and might wait till a second and a third, called an *alias* and a *pluries,* were issued before he produced the party, and many other vexatious shifts were practised to detain state-prisoners in custody.

The oppression of an obscure individual in this instance gave birth to **the famous habeas corpus act, 31 Car. II. c. 2,** which is frequently considered as another *Magna Carta* of the kingdom. The statute itself enacts: 1. That on complaint and request in writing, by or on behalf of any person committed and charged with any *crime* (unless committed for treason or felony expressed in the warrant, or as accessory, or on suspicion of being accessory before the fact to any petit-treason or felony, or upon suspicion of such petit-treason or felony, plainly expressed in the warrant, or unless he is convicted or charged in execution by legal process), the Lord Chancellor or any of the twelve judges in vacation, upon viewing a copy of the warrant, or affidavit that a copy is denied, shall (unless the party has neglected for two terms to apply to any court for his enlargement) award a *habeas*

corpus for such prisoner, returnable immediately before himself or any other of the judges; and upon the return made shall discharge the party, if bailable, upon giving security to appear and answer to the accusation in the proper court of judicature. [136] 2. That such writs shall be indorsed, as granted in pursuance of this act, and signed by the person awarding them. 3. That the writ shall be returned and the prisoner brought up within a limited time according to the distance, not exceeding in any case twenty days. 4. That officers and keepers neglecting to make due returns, or not delivering to the prisoner or his agent within six hours after demand a copy of the warrant of commitment, or shifting the custody of a prisoner from one to another without sufficient reason or authority (specified in the act), shall for the first offence forfeit 100*l.* and for the second offence 200*l.* to the party grieved, and be disabled to hold his office. That no person once delivered by *habeas corpus* shall be recommitted for the same offence on penalty of 500*l.* 6. That every person committed for treason or felony shall, if he requires it the first week of the next term, or the first day of the next session of *oyer and terminer,* be indicted in that term or session, or else admitted to bail, unless the king's witnesses cannot be produced at that time, and, if acquitted, or if not indicted and tried in the second term or session, he shall be discharged from his imprisonment for such imputed offence; but that no person, after the assizes shall be open for the county in which he is detained, shall be removed by *habeas corpus* till after the assizes are ended, but shall be left to the justice of the judges of assize. [137] 7. That any such prisoner may move for and obtain his *habeas corpus,* as well out of the Chancery or Exchequer as out of the King's Bench or Common Pleas; and the Lord Chancellor or judges denying the same, on sight of the warrant or oath that the same is refused, forfeit severally to the party grieved the sum of 500*l.* 8. That this writ of *habeas corpus* shall run into the counties palatine, cinque ports, and other privileged places, and the islands of Jersey and Guernsey. 9. That no inhabitant of England (except persons contracting, or convicts praying, to be transported, or having committed some

capital offense in the place to which they are sent) shall be sent prisoner to Scotland, Ireland, Jersey, Guernsey, or any places beyond the seas, within or without the king's dominions, on pain that the party committing, his advisers, aiders, and assistants, shall forfeit to the party aggrieved a sum not less than 500*l.*, to be recovered with treble costs, shall be disabled to bear any office of trust or profit, shall incur the penalties of *praemunire*, and shall be incapable of the king's pardon.

This is the substance of that great and important statute, which extends only to the case of commitments for such criminal charge as can produce no inconvenience to public justice by a temporary enlargement of the prisoner, all other cases of unjust imprisonment being left to the *habeas corpus* at common law. But even upon writs at the common law it is now expected by the court, agreeable to ancient precedents and the spirit of the act of parliament, that the writ should be immediately obeyed, without waiting for any *alias* or *pluries*, otherwise an attachment will issue.[6]

The satisfactory remedy for this injury of false imprisment is by an action of trespass vi et armis, usually called

6. By statutes in all the states the benefit of this writ is secured to every person illegally deprived of his liberty, whether by process or order of court or other tribunal or in any other manner whatsoever. The courts by which the writ may be issued and the manner of obtaining the writ are prescribed by constitution and statutes in pursuance thereof and its issuance when a proper showing has been made is enforced by severe penalties. Consult local state constitutions and statutes.

In cases arising under the federal jurisdiction the writ may be issued by a United States court or judge. See 2 Spelling Extra. Relief, §§ 1162-1183.

The writ cannot be employed as a substitute for appeal or writ of error, to try rights of property, etc., nor can it take the place of *quo warranto*. Id., § 1152.

In the absence of statutory provision, a refusal to discharge, except in the case of the custody of children, does not bar the issuance of a second writ by another court or officer. 2 Spelling Extra. Relief, §§ 1197, 1198 and cases cited.

For practical purposes the petition is treated as a complaint or declaration and the return as an answer in an ordinary action. Id., § 1317.

The writ is served, unless otherwise provided by statute, by delivering it to the person charged with the illegal restraint who makes return thereof with the person detained. As to the requisites of the return, see 2 Spelling Extra. Relief, § 1322.

an action of false imprisonment, which is generally and almost unavoidably accompanied with a charge of assault and battery also. [138]

III. With regard to the third absolute right of individuals, or that of private property, though the enjoyment of it when acquired is strictly a personal right, yet, as its nature and original and the means of its acquisition or loss fell more directly under our second general division of the *rights of things*, and as, of course, the wrongs that affect these rights must be referred to the corresponding division in the present book of our Commentaries, I conceive it will be more commodious and easy to consider together, rather than in a separate view, the injuries that may be offered to the *enjoyment* as well as to the *rights* of property. And therefore I shall here conclude the head of injuries affecting the *absolute* rights of individuals.

We are next to contemplate those which affect their relative rights, and, in particular, such injuries as may be done to persons under the four following relations: husband and wife, parent and child, guardian and ward, master and servant.

I. **Injuries that may be offered to a person considered as a husband** are principally three: **abduction,** or taking away a man's wife; **adultery,** or criminal conversation with her; and **beating,** or otherwise abusing her. [139] 1. As to the first sort, **abduction,** or taking her away, this may either be by fraud and persuasion or open violence, though the law in both cases supposes force and constraint, the wife having no power to consent, and therefore gives a remedy by writ of *ravishment,* or action of **trespass vi et armis,** *de uxore rapta et abducta.*[7] And the husband is also entitled to recover damages in an action on the case against such as persuade and entice the wife to live separate from him without a sufficient cause.[8] 2. **Adultery,**

7. Trespass by force and arms for a wife ravished and abducted.

8. A personal injury to the wife gives rise to two causes of action, one in favor of the wife for the personal injury to herself where she has a right to her earnings, etc., and one in favor of her husband to recover for the loss of his wife's services, society, etc., and for expenses, if any, incurred. Cooley on Torts (Students' Ed.), 254, where the cases are fully collected. Where she is enticed away, the ground of action is the loss of her services,

or criminal conversation with a man's wife, though it is as a public crime left by our laws to the coercion of the spiritual courts, yet, considered as a civil injury, the law gives a satisfaction to the husband for it by action of **trespass vi et armis** against the adulterer, wherein the damages recovered are usually very large and exemplary.[9] But these are properly increased and diminished by circumstances, as the rank and fortune of the plaintiff and defendant, the relation or connection between them, the seduction or otherwise of the wife, founded on her previous behavior and character, and the husband's obligation of settlement or otherwise to provide for those children which he cannot but suspect to be spurious. [140] **In this case, and upon indictments for polygamy, a marriage in fact must be proved,** though generally in other cases reputation and cohabitation are sufficient evidence of marriage. 3. The third injury is that of **beating** a man's wife, or otherwise ill-using her, for which, if it be a common assault, battery, or imprisonment, the law gives the usual remedy to recover damages by action of **trespass vi et armis,** which must be brought in the names of the husband and wife *jointly;* but if the beating or other maltreatment be very enormous, so that thereby the husband is deprived for any time of the company and assistance of his wife, the law then gives him a *separate* remedy by an action of trespass in nature of an action upon the case for this ill-usage, *per quod consortium amisit,*[1] in which he shall recover a satisfaction in damages.

II. **Injuries that may be offered to a person considered in the relation of a parent** were likewise of two kinds: 1. **Abduction,** or taking his children away; and 2. **Marrying** his son and heir without the father's consent, whereby during the continuance of the military tenure he lost the value of his marriage. [Obsolete.] As to the injury of **abduc-**

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society, etc. Ib. And now the tendency of authority favors giving the wife a right of action against one who alienates from her her husband's affections. Id., 257 and numerous cases in the note; Hale on Torts, 277, 278. In Huling v. Huling, 32 Ill. App. 519, such an action was held to lie at the suit of the wife against her mother-in-law for the enticement of her husband. See Cooley on Torts, 258.

9. See note 2 above.

1. By which he lost the society.

tion, or taking away the children from the father, that is also a matter of doubt whether it be a civil injury or no; for before the abolition of the tenure in chivalry it was equally a doubt whether an action would lie for taking and carrying away any other child besides the heir, some holding that it would not, upon the supposition that the only ground or cause of action was losing the value of the heir's marriage, and others holding that an action would lie for taking away *any* of the children, for that the parent hath an interest in them all to provide for their education. If, therefore, before the abolition of these tenures it was an injury to the father to take away the rest of his children as well as his heir (as I am inclined to think it was), it still remains an injury, and is remediable by writ of *ravishment*, or action of **trespass vi et armis**, *de filio, vel filia, rapto vel abducto*,[2] in the same manner as the husband may have it on account of the abduction of his wife.[3] [141]

III. **Of a similar nature to the last is the relation of guardian and ward, and the like actions, mutatis mutandis,[4] as are given to fathers, the guardian also has for recovery of damages, when his ward is stolen or ravished away from him.**[5] But a more speedy and summary method of redressing all complaints relative to wards and guardians hath of late obtained by an **application to the Court of Chancery**, which is the supreme guardian, and has the superintendent jurisdiction of all the infants in the kingdom. And it is expressly provided by statute 12 Car. II. c. 24, that testamentary guardians may mantain an action of ravishment or trespass for recovery of any of their wards, and also for damages to be applied to the use and benefit of the infants.

IV. **To the relation between master and servant**, and the rights accruing therefrom, **there are two species of injuries** incident. The one is, **retaining a man's hired servant before his time is expired**; the other is **beating or confining him** in such a manner that he is not able to perform his

2. Trespass by force and arms for son or daughter ravished or abducted.

3. The ground of this action is the same as in the case of the wife, namely, loss of service. See Cooley on Torts (Students' Ed.), 258-264.

4. The terms being changed.

5. Cooley on Torts Students' Ed.), 264.

work. As to the first, the retaining another person's servant during the time he has agreed to serve his present master, this is an illegal act. [142] For every master has by his contract purchased for a valuable consideration the service of his domestics for a limited time: the inveigling or hiring his servant, which induces a breach of this contract, is therefore an injury to the master; and for that injury the law has given him a remedy by a **special action on the case,** and he may also have an action against the servant for the non-performance of his agreement. But if the new master was not apprized of the former contract, no action lies against *him,* unless he refuses to restore the servant upon demand. The other point of injury is that of **beating, confining, or disabling a man's servant,** which depends upon the same principle as the last, viz., the property which the master has by his contract acquired in the labor of the servant. In this case, besides the remedy of an action of battery or imprisonment, which the servant himself as an individual may have against the aggressor, the master also, as a recompense for *his* immediate loss, may maintain an action of **trespass vie et armis,** in which he must allege and prove the special damage he has sustained by the beating of his servant, *per quod servitium amisit.*[6]

The wife cannot recover damages for beating her husband, for she hath no separate interest in anything during her coverture.[7] [143] **The child hath no property in his father or guardian,** as they have in him, for the sake of giving him education and nurture.[8] **And so the servant, whose master is disabled, does not thereby lose his maintenance or wages.** He had no property in his master; and if he receives his part of the stipulated contract, he suffers no injury, and is therefore entitled to no action for any battery or imprisonment which such master may happen to endure.

6. By which he lost his services. Cooley on Torts (Students' Ed.), 270.

7. See, however, Cooley on Torts (Students' Ed.), 257 and note; Hale on Torts, 277, 278 and note. A large number of cases are cited by the above authors in the notes.

8. See Cooley on Torts (Students' Ed.), 264. This rule has been changed by statute in some cases. Consult local statutes.

CHAPTER IX.

OF INJURIES TO PERSONAL PROPERTY.

I. **The rights of personal property in possession are liable to two species of injuries,** the amotion or deprivation of that possession, and the abuse or damage of the chattels, while the possession continues in the legal owner. [144] The former, or deprivation of possession, is also divisible into two branches: the unjust and unlawful *taking* them away, and the unjust *detaining* them, though the original taking might be lawful.

1. And first of an **unlawful taking.** [145] **The remedy for the wrongful taking of goods** is, in the first place, the restitution of the goods themselves so wrongfully taken, with damages for the loss sustained by such unjust invasion, which is effected by **action of replevin.** [See Action of Detinue, *post.*] **This obtains only in one instance of an unlawful taking, that of a wrongful distress;** and this and the action of **detinue** are almost the only actions in which the actual specific possession of the identical personal chattel is restored to the proper owner.

An action of replevin is founded upon a distress taken wrongfully and without sufficient cause, being a re-delivery of the pledge, or thing taken in distress, to the owner, upon his giving security to try the right of the distress, and to restore it if the right be adjudged against him, after which the distrainor may keep it till tender made of sufficient amends, but must then re-deliver it to the owner.[1] [146]

1. The action of replevin has been retained in some of the states but its scope has been very much increased by statute so that it lies for the recovery not only of goods and chattels unlawfully distrained, but for the recovery of goods and chattels unlawfully taken or detained in any other way, so that it now covers in scope not only the original action of replevin but the action of detinue also. The procedure has also been very much simplified by statute. In all the states the right to recover goods and chattels under the circumstances above stated, has, of course, been preserved by appropriate legal proceedings (claim and delivery, etc.), not called replevin, though, in substance, the same. Consult the local statutes and books on practice.

And formerly, when the party distrained upon intended to dispute the right of the distress, he had no other process by the old common law than by a writ of replevin, *replegiari facias*, which issued out of Chancery, commanding the sheriff to deliver the distress to the owner, and afterwards to do justice in respect of the matter in dispute in his own county court. [147] But this being a tedious method of proceeding, the beasts or other goods were long detained from the owner, to his great loss and damage.

For which reason **the statute of Marlbridge directs that (without suing a writ out of the Chancery) the sheriff, immediately upon plaint to him made, shall proceed to replevy the goods.** Upon application, therefore, either to the sheriff or one of his deputies, security is to be given in pursuance of the statute of Westm. 2, 13 Edw. I. c. 2. 1. That the party replevying will pursue his action against the distrainor, for which purpose he puts in *plegios de prosequendo*, or pledges to prosecute; and, 2. That if the right be determined against him, he will return the distress again, for which purpose he is also bound to find *plegios de retorno habendo*.[2] Besides these pledges, the sufficiency of which is discretionary and at the peril of the sheriff, the statute 11 Geo. II. c. 19, requires that the officer granting a replevin on a distress for rent shall take a bond with two sureties in a sum of double the value of the goods distrained, conditioned to prosecute the suit with effect and without delay, and for return of the goods; which bond shall be assigned to the avowant or person making cognizance, on request made to the officer, and, if forfeited, may be sued in the name of the assignee. The sheriff, on receiving such security, is immediately, by his officers, to cause the chattels taken in distress to be restored into the possession of the party distrained upon, unless the distrainor claims a property in the goods so taken. For if by this method of distress the distrainor happens to come again into possession of his own property in goods which before he had lost, the law allows him to keep them, without any reference to the manner by which he thus has gained possession, being a kind of personal *remitter*. [148] If, therefore, the dis-

2. Pledges to make return.

trainor claims any such property, the party replvying must sue out a writ *de proprietate probanda*,[3] in which the sheriff is to try, by an inquest, in whom the property previous to the distress subsisted. And if it be found to be in the distrainor, the sheriff can proceed no farther, but must return the claim of property to the Court of King's Bench or Common Pleas, to be there further prosecuted, if thought advisable, and there finally determined.

But if no claim of property be put in, or if (upon trial) the sheriff's inquest determines it against the distrainor, then the sheriff is to replevy the goods (making use of even force, if the distrainor makes resistance), in case the goods be found within his county. But if the distress be carried out of the county, or concealed, then the sheriff may return that the goods, or beasts, are *eloigned, elongata,* carried to a distance, to places to him unknown; and thereupon the party replevying shall have a writ of **capias in withernam,** *in vetito* (or, more properly, *repetito*) *namio,* a term which signifies a second or reciprocal distress, in lieu of the first, which was eloigned. It is therefore a command to the sheriff to take other goods of the distrainor, in lieu of the distress formerly taken, and eloigned, or withheld from the owner. So that here is now distress against distress, one being taken to answer the other by way of reprisal. For which reason goods taken in *withernam* cannot be replevied till the original distress is forthcoming.

But in common cases the goods are delivered back to the party replevying, who is then bound to bring his action of replevin, which may be prosecuted in the county court, be the distress of what value it may. [149] But either party may remove it to the superior courts of King's Bench or Common Pleas by writ of *recordari* or *pone,* the plaintiff at pleasure, the defendant upon reasonable cause; and also, if in the course of proceeding any right of freehold comes in question, the sheriff can proceed no farther, so that it is usual to carry it up in the first instance to the courts of Westminster Hall. Upon this action brought, and declaration delivered, the distrainor, who is now the defendant,

3. For the proof of the property.

makes **avowry**; that is, he *avows* taking the distress in his own right, or the right of his wife, and sets forth the reason of it, as for rent arrere, damage done, or other cause; or else, if he justifies in another's right as his bailiff or servant, he is said to make **cognizance**, that is, he *acknowledges* the taking, but insists that such taking was legal, as he acted by the command of one who had a right to distrain, and on the truth and legal merits of this avowry or cognizance the cause is determined. If it be determined for the plaintiff, viz., that the distress was wrongfully taken, he has already got his goods back into his own possession, and shall keep them, and moreover recover damages. But if the defendant prevails, by the default or nonsuit of the plaintiff, then he shall have a **writ de retorno habendo,**[4] whereby the goods or chattels (which were distrained and then replevied) are returned again into his custody, to be sold or otherwise disposed of as if no replevin hath been made. And at the common law the plaintiff might have brought another replevin, and so *in infinitum,* to the intolerable vexation of the defendant. Wherefore the statute of Westm. 2, c. 2, restrains the plaintiff, when nonsuited, from suing out any fresh replevin, but allows him a *judicial* writ, issuing out of the original record, and called a **writ of second deliverance,** in order to have the same distress again delivered to him on giving the like security as before. [150] And if the plaintiff be a second time nonsuit, or if the defendant has judgment upon verdict or demurrer in the first replevin, he shall have a **writ of return irreplevisable,** after which no writ of second deliverance shall be allowed. But in case of a distress for rent arrere, the writ of second deliverance is in effect taken away by statute 17 Car. II. c. 7, —

Which directs that, if the plaintiff be nonsuit before issue joined, then upon suggestion made on the record in nature of an avowry or cognizance; or if judgment be given against him on demurrer, then, without any such suggestion, the defendant may have a writ to inquire into the value of the distress by a jury, and shall recover the amount of it in damages, if less than the arrear of rent; or if more, then so much as shall be equal

4. For having return.

to such arrear, with costs; or, if the nonsuit be after issue joined, or if a verdict be against the plaintiff, then the jury impanelled to try the cause shall assess such arrears for the defendant; and if (in any of these cases) the distress be insufficient to answer the arrears distrained for, the defendant may take a further distress or distresses. But otherwise, if, pending a replevin for a former distress, a man distrains again for the same rent or service, then the party is not driven to his action of replevin, but shall have a writ of *recaption*, and recover damages for the defendant the re-distrainor's contempt of the process of the law.

In like manner other remedies for other unlawful takings of a man's goods consist only in recovering a satisfaction in damages. And if a man takes the goods of another out of his actual or virtual possession, without having a lawful title so to do, it is an injury, which, though it doth not amount to felony unless it be done *animo furandi*,[5] is nevertheless a transgression for which an action of **trespass vi et armis** will lie, wherein the plaintiff shall not recover the thing itself, but only damages for the loss of it.[6] [151] Or, if committed without force, the party may, at his choice, have another remedy in damages by **action of trover and conversion**, of which I shall presently say more.

2. **Deprivation of possession may also be by an unjust detainer** of another's goods, though the original *taking* was lawful.[7] As if I distrain another's cattle damage-feasant, and before they are impounded he tenders me sufficient amends; now, though the original taking was lawful, my subsequent detainment of them after tender of amends is wrongful, and he shall have an action of *replevin* against me to recover them; in which he shall recover damages only for the *detention* and not for the *caption*, because the original taking was lawful. Or if I lend a man a horse, and he afterwards refuse to restore it, this injury consists in the detaining, and not in the original taking, and the regular

5. With the intention of stealing.

6. In such a case the plaintiff has his election to sue in replevin, trespass or trover.

7. In the United States the action of detinue is obsolete, and by statute replevin lies not only for goods unlawfully taken, but also for goods unlawfully detained. See, generally, 1 Bouvier Law Dict., title Detinue. That the action has been used in this country (though now obsolete), see the American cases cited by Mr. Bouvier.

method for me to recover possession is by **action of detinue.** In this action of *detinue* it is necessary to ascertain the thing detained, in such manner as that it may be specifically known and recovered. Therefore it cannot be brought for money, corn, or the like; for that cannot be known from other money or corn, unless it be in a bag or a sack, for then it may be distinguishably marked. **In order, therefore, to ground an action of detinue, which is only for the detaining, these points are necessary:** 1. That the defendant came lawfully into possession of the goods, as either by delivery to him or finding them; 2. That the plaintiff have a property; 3. That the goods themselves be of some value; and 4. That they be ascertained in point of identity. [5. That they are unlawfully detained.] Upon this the jury, if they find for the plaintiff, assess the respective values of the several parcels detained, and also damages for the detention. And the judgment is conditional that the plaintiff recover the said goods, or (if they cannot be had) their respective values, and also the damages for detaining them. But there is one disadvantage which attends this action: viz., that **the defendant is herein permitted to wage his law,** that is, to exculpate himself by oath, and thereby defeat the plaintiff of his remedy.[8] [152]

The action of trover and conversion was in its original an action of trespass upon the case for recovery of damages against such person as had **found** another's goods and refused to deliver them on demand, but **converted** them to his own use; from which finding and converting it is called an action of *trover* and *conversion.* The freedom of this action

8. When in an action of debt on a simple contract the defendant pleaded *nil debet* and concluded his plea with this formula: "And this he is ready to defend against him the said A B and his suit, as the court of our lord, the king, here shall consider," etc., he was said to wage his law. He was then required to swear he owed the plaintiff nothing and to bring eleven compurgators to swear that they believed him.

Wager of law applied only to actions of debt on simple contract and to actions of detinue. Wager of law is now obsolete in the United States. If it still existed and there were no concurrent remedies, there would be no general need of a bankrupt law to discharge an insolvent debtor. See 2 Bouvier Law Dict., title Wager of Law.

from wager of law, and the less degree of certainty requisite in describing the goods, gave it so considerable an advantage over the action of *detinue*, that **by a fiction of law actions of trover were at length permitted to be brought against any man who had in his possession by any means whatsoever the personal goods of another, and sold them or used them without the consent of the owner, or refused to deliver them when demanded.**[9] **The injury lies in the conversion**; for any man may take the goods of another into possession if he finds them, but no finder is allowed to acquire a property therein unless the owner be forever unknown; and therefore he must not convert them to his own use, which the law presumes him to do if he refuses them to the owner; for which reason **such refusal also is, prima facie, sufficient evidence of a conversion. The fact of the finding, or trover, is therefore now totally immaterial**; for the plaintiff needs only to suggest (as words of form) that he lost such goods, and that the defendant found them; and if he proves that the goods are *his* property, and that the defendant had them in his possession, it is sufficient. **But a conversion must be fully proved,**[1] and then in this action the plaintiff shall recover damages equal to the value of the thing converted, but not the thing itself; which nothing will recover but an action of *detinue* or *replevin*.

As to the damage that may be offered to things personal while in the possession of the owner, as hunting a man's deer, shooting his dogs, poisoning his cattle, or in any wise taking from the value of any of his chattels, or making them in a worse condition than before, these are injuries

9. The action of trover in still in use in Illinois and Michigan and perhaps in other states. It is a concurrent action with trespass *de bonis asportatis* (for goods taken and carried away) and lies for the wrongful conversion of goods and chattels. Any exercise of unlawful dominion over the goods and chattels of another amounts to a conversion. In Michigan and Illinois the fiction of losing and finding is still retained in the declaration. See, generally, Puterburgh's Com. Law, Plead. & Practice (Ill.), 7th Ed., ch. 8, pp. 282-297; Green's New Practice (Mich.), 2d Ed., 71; 2 id. *1315; Cooley on Torts (Students' Ed.), 417; Burdick on Torts (2d Ed.), ch. 12, p. 399.

1. See note, *supra*.

too obvious to need explication. [153] The remedies given by the law to redress them are in two shapes: by action of **tespass vi et armis,** where the act is in itself *immediately* injurious to another's property, and therefore necessarily accompanied with some degree of force; and by **special action on the case,** where the act is in itself indifferent, and the injury only *consequential,* and therefore arising without any breach of the peace.[2] It is not material whether the damage be done by the defendant himself, or his servants by his direction, for the action will lie against the master as well as the servant. And if a man keeps a dog or other brute animal used to do mischief, as by worrying sheep, or the like, the owner must answer for the consequences if he knows of such evil habit.[3]

II. **We are next to consider those injuries which regard things in action only,** or such rights as are founded on and arise from *contracts.*

Express contracts include three distinct species: debts, covenants, and promises.

1. The legal acceptation of **debt** is a sum of money due by certain and express agreement, as, by a bond for a determinate sum, a bill or note, a special bargain, or a rent reserved on a lease, where the quantity is fixed and specific, and does not depend upon any subsequent valuation to settle it. [154] The non-payment of these is an injury, for which the proper remedy is by **action of debt** to compel the performance of the contract and recover the specifical sum

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2. As to the distinction at common law between the actions of trespass and case, see the leading case of Scott v. Shepherd, 2 Blackstone, 892; 1 Smith's Lead. Cases, *549, where it was held that trespass will lie for originally throwing a squib, which after having been thrown about in self-defence by other persons, at last put out the plaintiff's eye. See, also, Cooley on Torts (Students' Ed.), 40, 153.

The distinction between trespass and trespass on the case has been abolished by statute in Michigan and Illinois. Howell's Statutes, 1942; 1 Green's New Pract. *70; Ill. Rev. Stat., ch. 110, sec. 22. In Illinois counts in trover and replevin may, by statute, be joined in the same declaration. Id., § 23.

3. Cooley on Torts (Students' Ed.), 346 and notes; but the knowledge of the owner, or the *scienter,* must be averred and proved. Id., 346. As to animals *ferae naturae* the general rule is that a person keeps them at his peril and is liable for any injury they do to one not at fault. Id., 350; Burdick on Torts, 508.

due. This is the shortest and surest remedy, particularly where the debt arises upon a specialty, that is, upon a deed or instrument under seal. So, also, if I verbally agree to pay a man a certain price for a certain parcel of goods, and fail in the performance, an action of debt lies against me, for this is also a *determinate* contract; but if I agree for no settled price, I am not liable to an action of debt, but a special action on the case, according to the nature of my contract. And indeed actions of debt are now seldom brought but upon special contracts under seal, wherein the sum due is clearly and precisely expressed; for, in case of such an action upon a simple contract, the plaintiff labors under two difficulties. First, the defendant has here the same advantage as in an action of *detinue*, that of **waging his law**, or purging himself of the debt by oath, if he thinks proper. [Obsolete.] Secondly, in an action of debt the plaintiff must prove the whole debt he claims, or recover nothing at all. For the debt is one single cause of action, fixed and determined; and which, therefore, if the proof varies from the claim, cannot be looked upon as the same contract whereof the performance is sued for. If, therefore, I bring an action of debt for 30*l.*, I am not at liberty to prove a debt of 20*l.* and recover a verdict thereon, any more than if I bring an action of *detinue* for a horse, I can thereby recover an ox, — for I fail in the proof of that contract which my action or complaint has alleged to be specific, express, and determinate.[4] **But in an action on the case, on what is called an indebitatus assumpsit,** which is not brought to compel a specific performance of the contract, but to recover damages for its non-performance, the implied *assumpit,* and consequently the damages for the breach of it, are in their nature indeterminate, and will therefore adapt and proportion themselves to the truth of the case which shall be proved, without being confined to the precise demand stated in the declaration. [155] **For**

4. The action of debt is still in use in Michigan and Illinois and perhaps other states. It is now, however, concurrent with assumpsit described below. See Puterburgh's Com. Law, Plead. & Practice (7th Ed.), 425; 1 Green's New Prac., *68.

if any debt be proved, however less than the sum demanded, the law will raise a promise pro tanto, and the damages will of course be proportioned to the actual debt. So that I may declare that the defendant, *being indebted* to me in 30*l.* *undertook* or promised to pay it, but failed; and lay my damages arising from such failure at what sum I please, and the jury will, according to the nature of my proof, allow me either the whole in damages, or any inferior sum.[5] And even in actions of *debt,* where the contract is proved or admitted, if the defendant can show that he has discharged any part of it, the plaintiff shall recover the residue.

The form of the writ of debt is sometimes in the debet and detinet, and **sometimes in the detinet only,** that is, the writ states either that the defendant *owes* and unjustly *detains* the debt or thing in question, or only that he unjustly *detains* it. It is brought in the *debet* as well as *detinet* when sued by one of the original contracting parties who personally gave the credit against the other who personally incurred the debt, or against his heirs if they are bound to the payment; as by the obligee against the obligor, the landlord against the tenant, &c. But if it be brought by or against an executor for a debt due to or from the testator, this, not being his own debt, shall be sued for in the *detinet* only. So also if the action be for goods, or corn, or a horse, the writ shall be in the *detinet* only; for nothing but a sum of money, for which I (or my ancestors in my name) have personally contracted, is properly considered as my *debt.* And indeed a writ of *debt* in the *detinet* only, for goods and chattels, is neither more nor less than a mere writ of *detinue,* and is followed by the very same judgment.

2. **A covenant** also, contained in a deed, to do a direct act or to omit one, is another species of express contracts, the violation or breach of which is a civil injury. As if a man covenants to be at York by such a day, or not to exercise

5. The action of trespass on the case upon promises, or assumpsit, as it is usually styled, is in common use in Michigan and Illinois and possibly other states. See 1 Green's New Pract. *66; Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), ch 4, p. 70.

a trade in a particular place, and is not at York at the time appointed, or carries on his trade in the place forbidden, these are direct breaches of his covenant, and may be, perhaps, greatly to the disadvantage and loss of the covenantee. [156] The remedy for this is by a **writ of covenant**, which directs the sheriff to command the defendant generally to keep his covenant with the plaintiff (without specifying the nature of the covenant), or show good cause to the contrary; and if he continues refractory, or the covenant is already so broken that it cannot now be specifically performed, then the subsequent proceedings set forth with precision the covenant, the breach, and the loss which has happened thereby; whereupon the jury will give damages in proportion to the injury sustained by the plaintiff and occasioned by such breach of the defendant's contract.[6]

There is one species of covenant of a different nature from the rest, and that is a **covenant real** to convey or dispose of lands, which seems to be partly of a personal and partly of the real nature. For this the remedy is by a **special writ of covenant** for a specific performance of the contract concerning certain lands particularly described in the writ.[7]

No person could at common law take advantage of any covenant or condition, except such as were parties or privies thereto, and, of course, no grantee or assignee of any reversion or rent. To remedy which, and more effectually to secure to the king's grantees the spoils of the monasteries than newly dissolved, **the statute 32 Hen. VIII. c. 34**,[8] gives the assignee of a reversion (after notice of such assignment) the same remedies against the particular tenant, by entry or action, for waste or other forfeitures, non-payment

6. The action of covenant is also in use in Illinois, Michigan and possibly other states. See Puterburgh's Com. Law, Plead. & Practice (7th Ed.), ch. 7, p. 264; 1 Green's New Pract. *68. In Michigan this action is, by statute, now concurrent with assumpsit. Id., 68; Howell's Statutes, 1945.

7. The remedy now would be by bill in equity for a specific performance of the contract. This subject will be more fully considered in vol. 2 of this series.

8. See, generally, 1 Wash. Real Prop. *327; Spencer's Case, 5 Coke Rep. 16; 1 Smith's Lead. Cases, *116.

of rent, and non-performance of conditions, covenants, and agreements, as the assignor himself might have had, and makes him equally liable, on the other hand, for acts agreed to be performed by the assignor, except in the case of warranty.

3. **A promise** is in the nature of a verbal covenant, and wants nothing but the solmenity of writing and sealing to make it absolutely the same. If, therefore, it be to do any explicit act, it is an express contract as much as any covenant, and the breach of it is an equal injury. The remedy is by an **action upon the case** for what is called the **assumpsit**, or undertaking of the defendant, the failure of performing which is the wrong or injury done to the plaintiff, the damages whereof a jury are to estimate and settle. And if a builder promises, undertakes, or assumes to Caius [for a valuable consideration][9] that he will build and cover his houses within a time limited, and fails to do it, Caius has an action on the case against the builder for this breach of his express promise, undertaking, or *assumpsit,* and shall recover a pecuniary satisfaction for the injury sustained by such delay. So also in the case, before mentioned, of a debt by simple contract, if the debtor promises to pay it and does not, this breach of promise entitles the creditor to his action on the case, instead of being driven to an action of debt. Thus likewise a promissory note, or note of hand not under seal, to pay money at a day certain, is an express *assumpsit;* and the payee at common law, or by custom and act of parliament the indorsee, may recover the value of the note in damages if it remains unpaid. Some agreements, indeed, though never so expressly made, are deemed of so important a nature that they ought not to rest in verbal promise only, which cannot be proved but by the memory (which sometimes will induce the perjury) of witnesses. To prevent which **the statute of frauds and perjuries, 29 Car. II. c. 3, enacts that in the five following cases no verbal promise shall be sufficient to ground an action upon, but at the least some note or memorandum of it shall**

9. A valuable consideration must be averred and proved, or the promise will be a mere *nudum pactum* not enforcible at law. See *ante,* Contracts and *post,* vol. 2 of this series.

be made in writing, and signed by the party to be charged therewith: 1. Where an executor or administrator promises to answer damages out of his own estate. [158] 2. Where a man undertakes to answer for the debt, default, or miscarriage of another. 3. Where any agreement is made upon consideration of marriage. 4. Where any contract or sale is made of lands, tenements, or hereditaments, or any interest therein. 5. And lastly, where there is any agreement that is not to be performed within a year from the making thereof. In all these cases a mere verbal *assumpsit* is void.[1]

Contracts implied by law are such as reason and justice dictate, and which therefore the law presumes that every man has contracted to perform; and upon this presumption makes him answerable to such persons as suffer by his nonperformance.

Of this nature are, first, **such as are necessarily implied by the fundamental constitution of government, to which every man is a contracting party.** And thus it is that every person is bound and hath virtually agreed to pay such particular sums of money as are charged on him by the sentence, or assessed by the interpretation of the law. **Whatever, therefore, the laws order any one to pay, that becomes instantly a debt,** which he hath beforehand contracted to discharge. And this implied agreement it is that gives the plaintiff a right to institute a second action, founded merely on the general contract, in order to recover such damages or sum of money as are assessed by the jury and adjudged by the court to be due from the defendant to the plaintiff in any former action. So that if he hath once obtained a judgment against another for a certain sum, and neglects to take out execution thereupon, he may afterwards bring an **action of debt upon this judgment,**[2] and shall not be put upon the proof of the original cause of action; but upon

1. This section (4) of the Statute of Frauds has been re-enacted in substance in most, if not all, the states. See, generally, Clark on Contracts (3d Ed.), 80-121 and cases cited. See vol. 2 of this series, title Contracts.

2. See 1 Green's New Pract. *68; Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 440, where will be found forms of declarations on judgments.

showing the judgment once obtained, still in full force, and yet unsatisfied, the law immediately implies that by the original contract of society the defendant hath contracted a debt and is bound to pay it. [159]

On the same principle it is that a **forfeiture imposed by the by-laws and private ordinances of a corporation** upon any that belong to the body, or an **amercement** set in a court-leet or court-baron upon any of the suitors to the court (for otherwise it will not be binding), immediately create a debt in the eyes of the law, for non-payment of which **the remedy is by action of debt.**[3]

The same reason may with equal justice be applied to all penal statutes, that is, such acts of parliament whereby a forfeiture is inflicted for transgressing the provisions therein enacted. Usually these forfeitures created by statutte are given at large to any common informer, or, in other words, to any such person or persons as will sue for the same; and hence such actions are called **popular actions,** because they are given to the people in general. [160] Sometimes one part is given to the king, to the poor, or to some public use, and the other part to the informer or prosecutor; and then the suit is called a **qui tam action,** because it is brought by a person "*qui tam pro domino rege, &c., quam pro se ipso in hac parte sequitur.*" If the king, therefore, himself commences this suit he shall have the whole forfeiture. But if any one hath begun a *qui tam* or *popular* action, no other person can pursue it, and the verdict passed upon the defendant in the first suit is a bar to all others, and conclusive even to the king himself. This has frequently occasioned offenders to procure their own friends to begin a suit, in order to forestall and prevent other actions; which practice is in some measure prevented by a statute made in the reign of a very sharp-sighted prince in penal laws, 4 Hen. VII. c. 20, which enacts that no recovery, otherwise than by verdict obtained by collusion in an action popular, shall be a bar to any other action prosecuted *bona fide.*

3. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), ch. 13.

A second class of implied contracts are such as do not arise from the express determination of any court or the positive direction of any statute, but from natural reason and the just construction of law [161]; which class extends to all presumptive undertakings or **assumpsits**, which, though never perhaps actually made, yet constantly arise from the general implication and intendment of the courts of judicature, that every man hath engaged to perform what his duty or justice requires. Thus,

1. **If I employ a person to transact my business for me, or perform any work, the law implies that I undertook or assumed to pay him so much as his labor deserved.** And if I neglect to make him amends he has a remedy for this injury by bringing his action on the case upon this implied *assumpsit*, wherein he is at liberty to suggest that I promised to pay him so much as he reasonably deserved, and then to aver that his trouble was really worth such a particular sum, which the defendant has omitted to pay. But this valuation of his trouble is submitted to the determination of a jury, who will assess such a sum in damages as they think he really merited. This is called an **assumpsit on a quantum meruit.**

2. **There is also an implied assumpsit on a quantum valebat which is very similar to the former, being only where one takes up goods or wares of a tradesman without expressly agreeing for the price.** There the law concludes that both parties did intentionally agree that the real value of the goods should be paid, and an action on the case may be brought accordingly if the vendee refuses to pay that value.

3. **A third species of implied assumpsits is when one has had and received money belonging to another without any valuable consideration given on the receiver's part,** for the law construes this to be money had and received for the use of the owner only, and implies that the person so receiving promised and undertook to account for it to the true proprietor. [162] And if he unjustly detains it, an action on the case lies against him for the breach of such implied promise and undertaking, and he will be made to repay the

owner in damages equivalent to what he has detained in violation of such his promise. This is a very extensive and beneficial remedy, **applicable to almost every case where the defendant has received money which ex aequo et bono he ought to refund.** It lies for money paid by mistake or on a consideration which happens to fail, or through imposition, extortion, or oppression, or where any undue advantage is taken of the plaintiff's situation.

4. **Where a person has laid out and expended his own money for the use of another at his request** the law implies a promise of repayment, and an action will lie on this *assumpsit*.

5. **Likewise, upon a stated account between two merchants or other persons,** the law implies that he against whom the balance appears has engaged to pay it to the other, though there be not any actual promise. And from this implication it is frequent for actions on the case to be brought, declaring that the plaintiff and defendant had settled their accounts together, **insimul computassent** (which gives name to this species of *assumpsit*), and that the defendant engaged to pay the plaintiff the balance, but has since neglected to do it.[4]

But if no account has been made up, then the legal remedy is by bringing a **writ of account,**[5] *de computo*, commanding the defendant to render a just account to the plaintiff or show the court good cause to the contrary. [163] In this action, if the plaintiff succeeds, there are two judgments. The first is, that the defendant do account (*quod computet*) before auditors appointed by the court; and, when such amount is finished, then the second judgment is, that he do pay the plaintiff so much as he is found in arrear. This action, by the old common law, lay only against the parties themselves and not their executors, because matters of ac-

4. The foregoing constitute what are called the common counts in assumpsit and, as a matter of routine practice, should be found in every declaration in assumpsit upon a contract wholly executed on the plaintiff's side and where nothing remains to be done on the part of the defendant but the payment of money. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 76-86, for a variety of common counts; 1 Green's New Prac. 186, 187; 2 id. 1173-1192.

5. This action is obsolete in most of the states, but not in Illinois, though it is rarely brought. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), ch. 6.

count rested solely on their own knowledge. But this defect, after many fruitless attempts in parliament, was at last remedied by statute 4 Anne, c. 16, which gives an action of account against the executors and administrators. But, however, it is found by experience that **the most ready and effectual way to settle these matters of account is by a bill in a court of equity,** where a discovery may be had on the defendant's oath, without relying merely on the evidence which the plaintiff may be able to produce.[6]

6. **The last class of implied contracts arises upon this supposition, that every one who undertakes any office, employment, trust, or duty, contracts with those who employ or entrust him to perform it with integrity, diligence, and skill.** And if, by his want of either of those qualities, any injury accrues to individuals, they have therefore their remedy in damages by a **special action on the case.** A few instances will fully illustrate this matter. If an officer of the public is guilty of neglect of duty, or a palpable breach of it, of nonfeasance or of misfeasance, as, if the **sheriff** does not execute a writ sent to him, or if he wilfully makes a false return thereof, in both these cases the party aggrieved shall have an action *on the case* for damages to be assessed by a jury. If a sheriff or gaoler suffers a prisoner, who is taken up on mesne process (that is, during the pendency of a suit), to escape, he is liable to an action *on the case.* [164] But if, after judgment, a gaoler or a sheriff permits a debtor to escape who is charged in execution for a certain sum, the debt immediately becomes his own, and he is compellable by action of *debt,* being for a sum liquidated and ascertained, to satisfy the creditor his whole demand, which doctrine is grounded on the equity of the statute of Westm. 2, 13 Edw. I. c. 11, and 1 Ric. II. c. 12. **An advocate or attorney** that betrays the cause of his client, or, being retained, neglects to appear at the trial, by which the cause miscarries, is liable to an action on the case for reparation to his injured client.[7] There is also in law always an **implied contract with a common innkeeper** to secure his guest's goods in his inn; with a **common carrier**[8] or bargemaster to be an-

6. See Puterburgh's Pl. & Pr., Id.

7. See, as to liability for negligence of skilled workmen and professional men, generally, Cooley on Torts (Students' Ed.), 668-674 and cases cited.

8. See *ante,* Bailments.

swerable for the goods he carries; with a **common farrier,** that he shoes a horse well without laming him; with a **common tailor, or other workman,** that he performs his business in a workmanlike manner,— in which, if they fail, an action on the case lies to recover damages for such breach of their general undertaking. **But if I employ a person to transact any of these concerns, whose common profession and business it is not, the law implies no such general undertaking,** but, in order to charge him with damages, a *special* agreement is required. Also, if an innkeeper or other victualler hangs out a sign and opens his house for travelers, it is an implied engagement to entertain all persons who travel that way; and upon this universal *assumpsit* an action on the case will lie against him for damages if he without good reason refuses to admit a traveller.[9] If any one cheats me with false cards or dice, or by false weights and measures, or by selling me one commodity for another, an action on the case also lies against him for damages upon the contract which the law always implies, that every transaction is fair and honest.

In contracts, likewise, for sales, it is constantly understood that the seller undertakes that the commodity he sells is his own, and if it proves otherwise an action on the case lies against him to exact damages for this deceit. [165] **In contracts for provisions it is always implied that they are wholesome,** and if they be not the same remedy may be had. Also, if he that selleth anything doth upon the sale **warrant** it to be good the law annexes a tacit contract to his warranty that if it be not so he shall make compensation to the buyer, else it is an injury to good faith, for which an action on the case will lie to recover damages. **The warranty must be upon the sale,** for if it be made *after* and not *at* the time of the sale it is a void warranty; for it is then made without any consideration, neither does the buyer then take the goods upon the credit of the vendor. **Also the warranty can only reach to things in being** at the time of the warranty made, and not to things *in futoro,* as, that a horse *is* sound at the buying of him, not that he

9. Cooley on Torts (Students' Ed.), 305.

will be sound two years hence. But if the vendor knew the goods to be unsound, and hath used any art to disguise them, or if they are in any shape different from what he represents them to be to the buyer, this artifice shall be equivalent to an express warranty, and the vendor is answerable for their goodness. **A general warranty** will not extend to guard against defects that are plainly and obviously the object of one's senses, as if a horse be warranted perfect and wants either a tail or an ear, unless the buyer in this case be blind. But if cloth is warranted to be of such a length when it is not, there an action on the case lies for damages; for that cannot be discerned by sight, but only by a collateral proof, the measuring it. Also, if a horse is warranted sound, and he wants the sight of an eye, though this seems to be the object of one's senses, yet as the discernment of such defects is frequently matter of skill, it hath been held that an action on the case lieth to recover damages for this imposition.[1]

Besides the special action on the case, there is also a peculiar remedy entitled **an action of deceit** [obsolete], to give damages in some particular cases of fraud, and principally where one man does anything in the name of another by which he is deceived or injured, as if one brings an action in another's name, and then suffers nonsuit, whereby the plaintiff becomes liable to costs; or where one obtains or suffers a fraudulent recovery of lands, tenements, or chattels, to the prejudice of him that hath right. [166] It also lies in the cases of warranty before mentioned, and other personal injuries committed contrary to good faith and honesty. **But an action on the case for damages in nature of a writ of deceit is more usually brought upon these occasions.**[2]

1. See *ante*, Contracts and vol. 2 of this series, Warranty.

Where a warranty is both false and fraudulent, i. e., when the vendor either knows that his representations, being material, were false or consciously had no knowledge on the subject but still made a false and material representation as to a matter susceptible of knowledge, with intent that another should rely upon such representation who in fact did rely on it to his damage, the plaintiff has his election to bring an action of assumpsit on the warranty or case for the deceit. See, generally, Cooley on Torts (Students' Ed.), ch. 15, p. 460.

2. See note (1) above.

In those states which, following New York, have so-called codes of procedure the several forms of action described in this chapter have been abolished and one form of proceeding called a "civil action" adopted for all cases. The real essence of the injuries complained of remains the same, however, in both cases.

CHAPTER X.

OF INJURIES TO REAL PROPERTY; AND FIRST OF DISPOSSESSION, OR OUSTER OF THE FREEHOLD.

Real injuries, or injuries affecting real rights, are principally six: 1. Ouster; 2. Trespass; 3. Nuisance; 4. Waste; 5. Subtraction; 6. Disturbance. [167]

Ouster, or dispossession, is a wrong or injury that carries with it the amotion of possession; for thereby the wrongdoer gets into the actual occupation of the land or hereditament, and obliges him that hath a right to seek his legal remedy, in order to gain possession, and damages for the injury sustained. And such ouster, or dispossession, may either be of the *freehold,* or of *chattels real.* **Ouster of the freehold is effected by one of the following methods:** 1. Abatement; 2. Intrusion; 3. Disseisin; 4. Discontinuance; 5. Deforcement, — all of which in their order, and afterwards their respective remedies, will be considered in the present chapter.

1. And first, **an abatement** is where a person dies seised of an inheritance, and before the heir or devisee enters, a stranger who has no right makes entry, and gets possession of the freehold. This entry of him is called an abatement, and he himself is denominated an abator. [168]

2. The second species of injury, by ouster, or amotion of possession from the freehold, is by **intrusion**, which is the entry of a stranger, after a particular estate of freehold is determined, before him in remainder or reversion. [169] This entry and interposition of the stranger differ from an abatement in this, that an abatement is always to the prejudice of the heir, or immediate devisee, an intrusion is always to the prejudice of him in remainder or reversion.

3. The third species of injury by ouster, or privation of the freehold, is by **disseisin.** Disseisin is a wrongful putting out of him that is seised of the freehold. The two former species of injury were by a wrongful entry where the possession was vacant; but this is an attack upon him

who is in actual possession, and turning him out of it. Disseisin of things corporeal, as of houses, lands, &c., must be by entry and actual dispossession of the freehold. [170] Disseisin of incorporeal hereditaments cannot be an actual dispossession, for the subject itself is neither capable of actual bodily possession or dispossession; but it depends on their respective natures and various kinds, being in general nothing more than a disturbance of the owner in the means of coming at or enjoying them. But all these disseisins, of hereditaments incorporeal, are only so at the election and choice of the party injured, if, for the sake of more easily trying the right, he is pleased to suppose himself disseised.

Two remaining species of injury are where the entry of the tenant was at first lawful, but the wrong consists in the detaining of possession afterwards. [171]

4. Such is, fourthly, the injury of **discontinuance,** which happens when he who hath an estate-tail maketh a larger estate of the land than by law he is entitled to do, in which case the estate is good so far as his power extends who made it, but no farther. As if tenant in tail makes a feoffment in fee-simple, or for the life of the feoffee, or in tail, all which are beyond his power to make, for that by the common law extends no farther than to make a lease for his own life,—in such case the entry of the feoffee is lawful during the life of the feoffor. But if he retains the possession after the death of the feoffor, it is an injury which is termed a discontinuance, the ancient legal estate which ought to have survived to the heir in tail, being gone, or at least suspended, and for a while discontinued. [172]

5. The fifth and last species of injuries, by ouster, or privation of the freehold, where the entry of the present tenant or possessor was originally lawful, but his detainer is now become unlawful, is that by **deforcement.** This, in its most extensive sense, is *nomen generalissimum*,—a much larger and more comprehensive expression than any of the former, it then signifying the holding of any lands or tenements to which another person hath a right. So that this includes as well an abatement, an intrusion, a disseisin, or a discontinuance, as any other species of wrong whatsoever, whereby he that hath right to the freehold is kept out of possession. But, as contradistinguished from the former, it is only such a detainer of the freehold, from him that hath the right of property, but never had any possession under that right, as falls within none of the injuries which we have before explained. [173]

The remedy for the several species of ouster is universally the restitution of possession, and in some cases damages also. The methods of obtaining a remedy are various: 1. The first is that of **entry by the legal owner**, when another person, who hath no right, hath previously taken possession of lands or tenements. [174] In this case the party entitled may make a formal, but peaceable, entry thereon, declaring that thereby he takes possession; or he may enter on any part of it in the same county, declaring it to be in the name of the whole; but if it lies in different counties he must make different entries. [175] Also if there be *two* disseisors, the party disseised must make his entry on *both;* or if *one* disseisor has conveyed the lands with livery to *two* distinct feoffees, entry must be made on *both*. If the claimant be deterred from entering by menaces or bodily fear, he may make **claim**, as near to the estate as he can, with the like forms and solemnities, which claim is in force for only a year and a day. And this claim, if it be repeated once in the space of every year and a day (which is called *continual claim*), has the same effect with, and in all respects amounts to, a legal entry. Such an entry gives a man seisin, or puts into immediate possession him that hath right of entry on the estate, and thereby makes him complete owner, and capable of conveying it from himself by either descent or purchase.[1]

This remedy by entry takes place in three only of the five species of ouster, viz., abatement, intrusion, and disseisin.

But upon a discontinuance or deforcement the owner of the estate cannot enter, but is driven to his action; for herein the original entry being lawful, and thereby an apparent right of possession being gained, the law will not suffer that right to be overthrown by the mere act or entry of the claimant.

1. See 2 Wash. Real Prop. *485, 486, "As affecting the question of title, however, these principles [referring to re-entry by the disseisee] are chiefly important in determining whether a title has been gained by adverse enjoyment for the requisite period since the time when the actual seisin was gained by one and lost by the other." Ib. See, also, Stat. 3 & 4 Wm. 4, c. 27, and the local statutes of the several states as to the legal effect of entry.

Yet a man may enter on his tenant by sufferance; for such tenant hath no freehold, but only a bare possession, which may be defeated, like a tenancy at will, by the mere entry of the owner.

On the other hand, in case of abatement, intrusion, or disseisin, where entries are generally lawful, this right of entry may be **tolled,** that is, taken away by descent. [176] In general no man can recover possession by mere entry on lands which another hath by descent. [177] Yet this rule hath some exceptions, especially if the claimant were under any legal disabilities during the life of the ancestor, either of infancy, coverture, imprisonment, insanity, or being out of the realm, in all which cases there is no neglect or *laches* in the claimant, and therefore no descent shall bar or take away his entry. On the other hand, it is enacted by the statute of limitations, 21 Jac. I. c. 16, that no entry shall be made by any man upon lands, unless within twenty years after his right shall accrue. [178]

This remedy by entry must be pursued according to statute 5 Ric. II. st. 1, c. 8, in a peaceable and easy manner, and not with force or strong hand. [179] For if one turns or keeps another out of possession forcibly, this is an injury of both a civil and a criminal nature. The civil is remedied by immediate restitution, which puts the ancient possessor *in statu quo;*[2] the criminal injury, or public wrong, by breach of the king's peace, is punished by fine to the king. For by the statute 8 Hen. VI. c. 9, upon complaint made to any justice of the peace, of a **forcible entry,** with strong hand, on lands or tenements, or a **forcible detainer** after a peaceable entry, he shall try the truth of the complaint by jury, and upon force found shall restore the possession to the party so put out.[3] But this does not extend to such as endeavor to keep possession *manu forti,*[4] after three years' peaceable enjoyment of either themselves, their ancestors, or those under whom they claim; by a subsequent clause of the same statute, enforced by statute 31 Eliz. c. 11.

2. In his former condition or state.

3. These statutes have been re-enacted and extended by most of the states. See Gen. Stat. Mass., ch. 137, sec. 1; Rev. Stat. Ill. 1874, 335, sec. 1; Rev. Stat. N. Y., pt. 3, ch. 8, tit. 10, sec. 1; 2 Comp. Laws, Mich. 1871, sec. 6695.

4. By a strong hand.

II. Thus far of remedies when tenant or occupier of the land hath gained only a *mere* possession, and no apparent shadow of right. Next follow another class which are in use where the title of the tenant or occupier is advanced one step nearer to perfection, so that he hath in him not only a bare possession, which may be destroyed by a bare entry, but also an *apparent right of possession*, which cannot be removed but by orderly course of law, in the process of which it must be shown that though he hath at present possession and therefore hath the presumptive right, yet, there is a right of possession superior to his, residing in him who brings the action. [180]

These remedies are either by a **writ of entry** or an **assise**, which are action merely *possessory*, serving only to regain that possession whereof the demandant (that is, he who sues for the land) or his ancestors have been unjustly deprived by the tenant or possessor of the freehold, or those under whom he claims. They decide nothing with respect to the *right of property*, only restoring the demandant to that state or situation in which he was (or by law ought to have been) before the dispossession committed. But this without any prejudice to the right of ownership; for if the dispossessor has any legal claim, he may afterwards exert it, notwithstanding a recovery against him in these possessory actions. Only the law will not suffer him to be his own judge, and either take or maintain possession of the lands until he hath recovered them by legal means, rather presuming the right to have accompanied the ancient seisin than to reside in one who had no such evidence in his favor.

1. The first of these possessory remedies is by **writ of entry** [obsolete], which is that which disproves the title of the tenant or possessor, by showing the unlawful means by which he entered or continues possession.

This remedy is applicable to all the cases of ouster before mentioned, except that of discontinuance by tenant in tail, and some peculiar species of deforcements. [182] [See the text for these exceptions.]

2. As a writ of entry is a real action which *disproves* the title of the tenant by showing the unlawful commencement of his possession, so a **writ of assise** [obsolete] is a real action which *proves* the title of the demandant merely by showing his or his ancestor's possession. And these two remedies are in all other respects so totally alike, that a judgment or recovery in one is a bar against the other; so that when a man's possession is once established by either of these possessory actions, it can never be disturbed by the same antagonist in any other of them. [185] This remedy, by writ of assise, is only applicable to two species of injury by ouster, viz. *abatement* and a recent or *novel disseisin*.

III. By these several possessory remedies the right of possession may be restored to him that is unjustly deprived thereof. [190] But the right of *possession* (though it carries with it a strong presumption) is not always conclusive evidence of the right of *property*, which may still subsist in another man. For as one man may have the *possession* and another the *right of possession*, which is recovered by these possessory actions, so one man may have the *right of possession*, and so not be liable to eviction

by any possessory action, and another may have the *right of property*, which cannot be otherwise asserted than by the great and final remedy of **a writ of right**, or such correspondent writs as are in the nature of a writ of right. [191] [Obsolete.]

This happens principally in four cases: 1. Upon **discontinuance** by the alienation of tenant in tail, whereby he who had the right of possession hath transferred it to the alienee, and therefore his issue, or those in remainder or reversion, shall not be allowed to recover by virtue of that possession which the tenant hath so voluntarily transferred. 2, 3. In case of judgment given against either party, whether by his own default or upon trial of the merits in any possessory action; for such judgment, if obtained by him who hath not the true ownership, is held to be a species of deforcement, which, however, binds the right of possession, and suffers it not to be ever again disputed, unless the right of property be also proved. 4. In case the demandant, who claims the right, is barred from these possessory actions by length of time and the statute of limitations; for an undisturbed possession for fifty years ought not to be devested by anything but a very clear proof of the absolute right of property. In these four cases the law applies the remedial instrument of either the writ of right itself, or such other writs as are said to be of the same nature. [For particulars, see text.]

The title of lands is now usually tried in actions of **ejectment** or **trespass**; of which in the following chapters.[5] [197]

5. The real actions have been abolished or become obsolete in all the states and in England. See 3 & 4 Wm. 4, ch. 27, and the local statutes of the several states.

CHAPTER XI.

OF DISPOSSESSION, OR OUSTER, OF CHATTELS REAL.

I. **Ouster, or amotion of possession from estates held by statute, recognizance, or elegit,** is only liable to happen by a species of disseisin, or turning out of the legal proprietor before his estate is determined, by raising the sum for which it is given him in pledge. [198] And for such ouster, though the estate be merely a chattel interest, the owner shall [by statute] have the same remedy as for an injury to a freehold, viz. by **assise of novel disseisin.** [Obsolete.]

II. **As for ouster or amotion of possession, from an estate for years,** this happens only by a like kind of disseisin, ejection, or turning out of the tenant from the occupation of the land during the continuance of his term. [199] For this injury the law has provided him with two remedies, according to the circumstances and situation of the wrongdoer: **the writ of ejectione firmae,**[1] which lies against any one, the lessor, reversioner, remainder-man, or any stranger who is himself the wrongdoer and has committed the injury complained of; and **the writ of quare ejecit infra terminum,**[2] which lies not against the wrongdoer or ejector himself, but his feoffee or other person claiming under him. **These are mixed actions,** somewhat between real and personal; for therein are two things recovered, as well restitution of the term of years as damages for the ouster or wrong.

1. A writ then of *ejectione firmae,* or **action of trespass in ejectment,** lieth where lands or tenements are let for a term of years, and afterwards the lessor, reversioner, remainder-man, or any stranger doth eject or oust the lessee of his term. And by this writ the plaintiff shall recover back his term, or the remainder of it, with damages. Since the disuse of real actions, this mixed proceeding is become the common method of trying the title to lands or tenements. [200]

The remedy by ejectment is in its original an action

1. Ejection from the farm.

2. Wherefore he ejected within the term.

brought by one who hath a lease for years to repair the injury done him by dispossession. [201] In order, therefore, to convert it into a method of trying titles to the freehold, it is first necessary that the claimant do take possession of the lands, to empower him to constitute a lessee for years, that may be capable of receiving this injury of dispossession. When, therefore, a person who hath right of entry into lands determines to acquire that possession which is wrongfully withheld by the present tenant, he makes (as by law he may) a **formal entry** on the premises, and being so in the possession of the soil, he there, upon the land, seals and delivers a **lease for years** to some third person or lessee, and, having thus given him entry, leaves him in possession of the premises. This lessee is to stay upon the land till the prior tenant, or he who had the previous possession, enters thereon afresh and ousts him, or till some other person (either by accident or by agreement beforehand) comes upon the land, and turns him out or ejects him. [202] For this injury the lessee is entitled to his action of ejectment against the tenant, or this **casual ejector**, whichever it was that ousted him, to recover back his term and damages. But where this action is brought against such a casual ejector as is before mentioned, and not against the very tenant in possession, the court will not suffer the tenant to lose his possession without any opportunity to defend it. Wherefore it is a standing rule that no plaintiff shall proceed in ejectment to recover lands against a casual ejector without **notice given to the tenant in possession** (if any there be), and making him a defendant if he pleases. And in order to maintain the action the plaintiff must, in case of any defence, make out four points before the court, viz., **title, lease, entry, and ouster.** First, he must show a good *title* in his lessor, which brings the matter of right entirely before the court; then, that the lessor, being seised or possessd by virtue of such title, did make him the *lease* for the present term; thirdly, that he, the lessee or plaintiff, did *enter* or take possession in consequence of such lease: and then, lastly, that the defendant *ousted* or ejected him. Whereupon he shall have judgment to recover his

term and damages, and shall, in consequence, have a *writ of possession*, which the sheriff is to execute by delivering him the undisturbed and peaceable possession of his term.

This is the regular method of bringing an action of ejectment, and must be still continued in due form and strictness, save only as to the notice to the tenant whenever the possession is vacant or there is no actual occupant of the premises, and also in some other cases. But as much trouble and formality were found to attend the actual making of the *lease, entry,* and *ouster,* **a new and more easy method of trying titles by writ of ejectment,** where there is any actual tenant or occupier of the premises in dispute, was invented somewhat more than a century ago by the Lord Chief Justice Rolle. [203] This new method entirely depends upon a string of **legal fictions: no actual lease is made, no actual entry by the plaintiff, no actual ouster by the defendant,** but all are merely ideal for the sole purpose of trying the title. To this end, in the proceedings, a **lease** for a term of years is stated to have been made by him who claims title, to the plaintiff who brings the action, as by John Rogers to Richard Smith. It is also stated that Smith, **the lessee, entered,** and that the defendant William Stiles, who is called the **casual ejector,** ousted him, for which ouster he brings this action. As soon as this action is brought, and the complaint fully stated in the declaration, Stiles, the casual ejector or defendant, sends a **written notice to the tenant** in possession of the lands, as George Saunders, informing him of the action brought by Richard Smith, and transmitting him a copy of the declaration, withal assuring him that he, Stiles, the defendant, has no title at all to the premises, and shall make no defence, and therefore advising the tenant to appear in court and defend his own title, otherwise he, the casual ejector, will suffer judgment to be had again him, and thereby the actual tenant, Saunders, will inevitably be turned out of possession. On receipt of this friendly caution, if the tenant in possession does not within a limited time apply to the court to be admitted a defendant in the stead of Stiles, he is supposed to have no right at all; and, upon judgment

being had against Stiles, the casual ejector, Saunders, the real tenant, will be turned out of possession by the sheriff.

But if the tenant in possession applies to be made a defendant it is allowed him upon this condition: that he enter into a **rule of court** to confess at the trial of the cause three of the four requisites for the maintenance of the plaintiff's action, viz., the *lease* of Rogers, the lessor, the *entry* of Smith, the plaintiff, and his *ouster* by Saunders himself, now made the defendant instead of Stiles — which requisites being wholly fictitious, should the defendant put the plaintiff to prove them, he must of course be nonsuited for want of evidence; but by such stipulated confession of *lease, entry,* and *ouster*, the trial will now stand upon the merits of the *title* only. [204] This done, the declaration is altered by inserting the name of George Saunders instead of William Stiles, and the cause goes down to trial under the name of Smith (the plaintiff), on the demise of Rogers (the lessor), against Saunders, the new defendant. And therein the lessor of the plaintiff is bound to make out a clear title, otherwise his fictitious lessee cannot obtain judgment to have possession of the land for the term supposed to be granted. But if the lessor makes out his title in a satisfactory manner, then judgment and a writ of possession shall go for Richard Smith, the nominal plaintiff, who by this trial has proved the right of John Rogers, his supposed lessor. **But if the new defendants, whether landlord or tenant or both, after entering into the common rule, fail to appear at the trial,** and to confess lease, entry, and ouster, the plaintiff (Smith) must indeed be there nonsuited for want of proving those requisites; but judgment will in the end be entered against the casual ejector, Stiles, for the condition on which Saunders or his landlord was admitted a defendant is broken, and therefore the plaintiff is put again in the same situation as if he never had appeared at all, the consequence of which (we have seen) would have been that judgment would have been entered for the plaintiff, and the sheriff, by virtue of a writ for that purpose, would have turned out Saunders and delivered possession to Smith. [205] The same process there-

fore as would have been had, provided no conditional rule had been ever made, must now be pursued as soon as the condition is broken.[3]

The damages recovered in these actions, though formerly their only intent, are now usually (since the title has been considered as the principal question) very small and inadequate, amounting commonly to one shilling or some other trivial sum. In order, therefore, to complete the remedy, when the possession has been long detained from him that had the right to it, **an action of trespass also lies after a recovery in ejectment** to recover the mesne profits which the tenant in possession has wrongfully received; which action may be brought in the name of either the nominal plaintiff in the ejectment or his lessor against the tenant in possession, whether he be made party to the ejectment, or suffers judgment to go by default. In this case the judgment in ejectment is conclusive evidence against the defendant for all profits which have accrued since the date of the demise stated in the former declaration of the plaintiff; but if the plaintiff sues for any antecedent profits, the defendant may make a new defence.[4]

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3. The action of ejectment is still in use *eo nomine* (by that name) in Illinois, Michigan and probably other states; but it has been shorn of its fictions and the action is begun like any other action by the real claimant against the party in possession or alleged owner, if unoccupied. At common law one or both the parties to the action being fictitious, the judgment was not a bar and the unsuccessful party might re-try the same question as often as he pleased without the leave of the court; for by making a fresh demise to another nominal character, it becomes the action of a new plaintiff upon another right, and the courts of law could not any farther prevent this repetition of the action, than by ordering the proceedings in one ejectment to be stayed till the costs of a former *ejectment*, though brought in another court, be discharged. 2 Bla. Rep. 1158; Barnes, 133. But a court of equity, in some instances where there had been several trials in ejectment for the same premises, though the title was entirely legal, has granted a perpetual injunction. 1 P. W. 672. By statute, however, one or more new trials are now granted in certain cases. Consult the local statutes. See 1 Green's New Practice, 371; Howell's (Mich.) Statutes, 1955, 1956; Rev. Stat. Ill., ch. 45, sec. 35.

4. In Illinois, Michigan and probably other states, it is not now necessary to bring a new action for the mesne profits, but they may be recovered in the same action on filing what is called a suggestion of claim

A writ of ejectment is not an adequate means to try the title of all estates, for on those things whereon an entry cannot in fact be made no entry shall be supposed by any fiction of the parties. Therefore an ejectment will not lie of an advowson, a rent, a common, or other incorporeal hereditament.

2. **The writ of quare ejecit infra terminum** lieth by the ancient law where the wrongdoer or ejector is not himself in possession of the lands, but another who claims under him. [207] But since the introduction of fictitious ousters, whereby the title may be tried against any tenant in possession (by what means soever he acquired it), and the subsequent recovery of damages by action of trespass for mesne profits, this action is fallen into disuse.

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for mesne profits. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 420, 421; 1 Green's New Prac. 375; 6 Hill (N. Y.) 328.

CHAPTER XII.

OF TRESPASS.

Trespass, in its largest and most extensive sense, signifies any transgression or offence against the law of nature, of society, or of the country in which we live, whether it relates to a man's person or his property. [208] **But in the limited and confined sense** in which we are at present to consider it, it signifies no more than an entry on another man's ground without a lawful authority, and doing some damage, however, inconsiderable, to his real property. [209]

The law of England treats every entry upon another's lands (unless by the owner's leave, or in some very particular cases) as an injury or wrong, for satisfaction of which an action of trespass will lie, but determines the *quantum* of that satisfaction by considering how far the offence was wilful or inadvertent, and by estimating the value of the actual damage sustained.

Every unwarrantable entry on another's soil the law entitles a trespass **by breaking his close,** the words of the writ of trespass commanding the defendant to show cause *quare clausum querentis fregit.*[1] For every man's land is in the eye of the law enclosed and set apart from his neighbor's and that either by a visible and material fence, as one field is divided from another by a hedge, or by an ideal invisible boundary, existing only in the contemplation of law, as when one man's land adjoins to another's in the same field. [210] And every such entry or breach of a man's close carries necessarily along with it some **damage** or other; for if no other special loss can be assigned, yet still the words of the writ itself specify one general damage, viz., the treading down and bruising his herbage.

1. Wherefore he broke the plaintiff's close.

This action is still in use in Michigan, Illinois and probably other states. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 320, 633; 1 Green's New Practice, *70, 71. In both states trespass and case are concurrent remedies. Id. The same remedy exists, though under another form in all the states.

One must have a property (either absolute or temporary) in the soil, and actual possession by entry, to be able to maintain an action of trespass; or at least it is requisite that the party have a lease and possession of the vesture and herbage of the land. But before entry and actual possession one cannot maintain an action of trespass though he hath the freehold in law. And therefore an heir before entry cannot have this action against an abator, though a disseisee might have it against the disseisor for the injury done by the disseisin itself at which time the plaintiff was seised of the land; but he cannot have it for any act done after the disseisin until he hath gained possession by re-entry, and then he may well maintain it for the intermediate damage done, for after his re-entry the law, by a kind of *jus postliminii,* supposes the freehold to have all along continued in him.

A man is answerable for not only his own trespass but that of his cattle also; for if by his negligent keeping they stray upon the land of another (and much more, if he permits, or drives them on), and they there tread down his neighbor's herbage and spoil his corn or his trees, this is a trespass for which the owner must answer in damages, and the law gives the party injured a double remedy in this case, by permitting him to distrain the cattle thus *damage-feasant,* or doing damage, till the owner shall make him satisfaction, or else by leaving him to the common remedy *in foro contentioso,*[2] by action. [211] And the action that lies in either of these cases of trespass committted upon another's land, either by a man himself or his cattle, is the action of trespass *vi et armis.*

In trespasses of a permanent nature, where the injury is continually renewed (as by spoiling or consuming the herbage with the defendant's cattle), the declaration may allege the injury to have been committed by *continuation* from one given day to another (which is called laying the action with a **continuando**), and the plaintiff shall not be compelled to bring separate actions for every day's separate offence. [212] **But where the trespass is by one or several**

2. In a court of litigation.

acts, each of which terminates in itself, and being once done cannot be done again, it cannot be laid with a *continuando;* yet if there be repeated acts of trespass committed, as cutting down a certain number of trees, they may be laid to be done, not continually, but at divers days and times within a given period.[3]

In some cases trespass is justifiable, or, rather, entry on another's land or house shall not in those cases be accounted trespass, as if a man comes thither to demand or pay money there payable, or to execute in a legal manner the process of the law. Also, a man may justify entering into an inn or public house without the leave of the owner first specially asked, because when a man professes the keeping such inn or public house he thereby gives a general licence to any person to enter his doors. So a landlord may justify entering to distrain for rent, a commoner to attend his cattle commoning on another's land, and a reversioner to see if any waste be committed on the estate for the apparent necessity of the thing. In like manner the common law warrants the hunting of ravenous beasts of prey, as badgers and foxes, in another man's land, because the destroying such creatures is said to be profitable to the public. [213] [Not the law, except perhaps as to noxious animals that are a public nuisance.] **But in cases where a man misdemeans himself, or makes an ill use of the authority with which the law intrusts him, he shall be accounted a trespasser ab initio,** as if one comes into a tavern and will not go out in a reasonable time, but tarries there all night contrary to the inclinations of the owner, this wrongful act shall affect and have relation back even to his first entry, and make the whole a trespass. **But a bare nonfeasance, as not paying for the wine he calls for, will not make him a trespasser,** for this is only a breach of contract for which the travener shall have an action of debt or

3. The latter mode prevails in modern practice, and the form of declaring with a continuando has grown obsolete. Under the statement that the defendant, on a day named, and on divers other days and times between that day and the commencement of the suit, trespassed, the plaintiff may prove any number of trespasses within those limits, though none are specified except those on the earliest day named. 1 Stark. R. 351.

assumpsit against him.[4] So if a landlord distrained for rent and wilfully killed the distress, this by the common law made him a trespasser *ab initio*. If a reversioner who enters on pretence of seeing waste breaks the house or stays there all night, or if the commoner who comes to tend his cattle cuts down a tree, in these and similar cases the law judges that he entered for this unlawful purpose; and therefore, as the act which demonstrates such his purpose is a trespass, he shall be esteemed a trespasser *ab initio*. So, also, in the case of hunting the fox or the badger, a man cannot justify breaking the soil and digging him out of his earth; for though the law warrants the hunting of such noxious animals for the public good,[5] yet it is held that such things must be done in an ordinary and usual manner: therefore, as there is an ordinary course to kill them, viz., by hunting, the court held that the digging for them was unlawful. [214]

A man may also justify in an action of trespass on account of the freehold and right of entry being in himself, and this defence brings the title of the estate in question.[6] This is therefore one of the ways devised since the disuse of real actions to try the property of estates, though it is not so usual as that by ejectment, because that, being now a mixed action, not only gives damages for the ejection, but also possession of the land; whereas in trespass, which is merely a personal suit, the right can be only ascertained, but no possession delivered, nothing being recovered but damages for the wrong committed.

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4. This is the rule in the leading case known as The Six Carpenters' Case, 8 Coke, 146; 1 Smith's Lead. Cases, *216.

5. Not the law in this country. Even a state license to hunt and fish confers no right to commit a trespass. Cooley on Torts (Students' Ed.), 313; Diana Shooting Club v. Lamoreaux, 114 Wis. 44.

6. By the plea of *liberum tenementum*, i. e., that the *locus in quo* was the defendant's freehold. Gould's Pleading, ch. vi, part 2, secs. 91-93.

CHAPTER XIII.

OF NUISANCE.

A third species of real injuries to a man's lands and tenements is by *nuisance*. **Nuisance (nocumentum) or annoyance signifies anything that worketh hurt, inconvenience, or damage.** [216] And nuisances are of two kinds: **public or common nuisances**, which affect the public and are annoyance to *all* the king's subjects, for which reason we must refer them to the class of public wrongs or crimes and misdemeanors;[1] and **private nuisances**, which are the objects of our present consideration, and may be defined anything done to the hurt or annoyance of the lands, tenements, or hereditaments of another.

I. We will consider first such nuisances as may affect a man's corporeal hereditaments, and then those that may damage such as are incorporeal.

1. **First, as to corporeal inheritances.** If a man builds a house so close to mine that his roof overhangs my roof and throws the water off his roof upon mine, this is a nuisance for which an action will lie. Likewise to erect a house or other building so near to mine that it obstructs my ancient lights and windows is a nuisance of a similar nature.[2] Also, if a person keeps his hogs or other noisome animals so near the house of another that the stench of them incommodes him and makes the air unwholesome, this is an injurious nuisance, as it tends to deprive him of the use and benefit of his house. A like injury is if one's neighbor sets up and exercises an offensive trade, as a tanner's, a tallow-chandler's, or the like; for though these are lawful and necessary trades, yet they should be exercised in remote places, for the rule is, "*sic utere tuo, ut alienum non laedas.*"[3]

1. *Post*, Book 4.

2. See, as to ancient lights, *ante*. Not applicable to this country.

3. So use your own as not to injure another. Broom's Legal Maxims, *327; 9 Rep. 59.

See, generally, as to nuisances, Cooley on Torts (Students' Ed.), ch. 17; Burdick on Torts, ch. 14. As to the degree of annoyance necessary to constitute a nuisance, see Cooley (*supra*), 571; St. Helen's Smelting Co. v. Tipping, 11 H. L. Cas. 642; s. c. Big. Lead. Cases, 454; Susque-

This therefore is an actionable nuisance. **So that the nuisances which affect a man's dwelling may be reduced to these three:** 1. Overhanging it, which is also a species of trespass, for *cujus est solum, ejus est usque ad coelum;*[4] 2. Stopping ancient lights; and 3. Corrupting the air with noisome smells; for light and air are two indispensable requisites to every dwelling. But depriving one of a mere matter of pleasure, as of a fine prospect by building a wall, or the like, this, as it abridges nothing really convenient or necessary, is no injury to the sufferer, and is therefore not an actionable nuisance.

As to nuisance to one's lands: if one erects a smelting-house for lead so near the land of another that the vapor and smoke kill his corn and grass, and damage his cattle therein, this is held to be a nuisance. And by consequence it follows that if one does any other act, in itself lawful, which yet being done in that place necessarily tends to the damage of another's property, it is a nuisance; for it is incumbent on him to find some other place to do that act where it will be less offensive. [218] So also, if my neighbor ought to scour a ditch, and does not, whereby my land is overflowed, this is an actionable nuisance.[5]

With regard to other corporeal hereditaments: it is a nuisance to stop or divert water that uses to run to another's meadow or mill; to corrupt or poison a watercourse by erecting a dye-house or a lime-pit for the use of trade in the upper part of the stream; or, in short, to do any act therein that in its consequences must necessarily tend to the prejudice of one's neighbor.[6]

2. **As to incorporeal hereditaments,** the law carries itself with the same equity. If I have a way annexed to my

hanna Fertilizer Co. v. Malone, 73 Md. 268; Bohan v. Port Jervis Gas Lt. Co., 112 N. Y. 18.

That cannot, however, be a nuisance which has been authorized by the legislature acting within constitutional limits. Cooley on Torts (Students' Ed.), 611.

4. He who owns the land, owns also even to heaven. This doctrine must now be taken with some reservations. See Law Notes for July, 1914, 62; The Law of Motor Vehicles, by Mr. Berkeley Davids, §§ 290, 291.

5. See preceding notes.

6. Cooley on Torts (Students' Ed.), 578, 592, 593 and cases cited.

estate across another's land, and he obstructs me in the use of it, either by totally stopping it or putting logs across it or ploughing over it, it is a nuisance.[7]

II. **As to the remedies** which the law has given for this injury or nuisance, I must premise that the law gives no *private* remedy for anything but a *private* wrong. [219] Therefore **no action lies for a public or common nuisance,** but an *indictment* only. Yet this rule admits of **one exception,** where a private person suffers some extraordinary damage, beyond the rest of the king's subjects, by a public nuisance, in which case he shall have a private satisfaction by action. [220] As if, by means of a ditch dug across the public way, which is a common nuisance, a man or his horse suffer any injury by falling therein, there for this particular damage, which is not common to others, the party shall have his action. **Also if a man hath abated, or removed, a nuisance which offended him,** in this case he is entitled to no action.[8]

The remedies by suit are, 1. By action on the case for damages, in which the party injured shall only recover a satisfaction for the injuries sustained, but cannot thereby remove the nuisance. Indeed every continuance of a nuisance is held to be a fresh one, and therefore a fresh action will lie, and very exemplary damages will probably be given, if, after one verdict against him, the defendant has the hardiness to continue it.[9]

The law provided two other actions, **the assize of nuisance** and the **writ of quod permittat prosternere,**[1] which not only give the plaintiff satisfaction for his injury past, but also strikes at the root and remove the cause itself, the nuisance that occasioned the injury. These two actions, however, can only be brought by the tenant of the freehold, so that a lessee for years is confined to his action upon the case.[2]

7. See, generally, Cooley on Torts (Students' Ed.), ch. 12, pp. 351, 362.

8. The abator may maintain an action for the recovery of damages sustained by him prior to the abatement, notwithstanding such abatement. Lansing v. Smith, 4 Wend. 9; Pierce v. Dart, 7 Cow. 609; Gleason v. Gary, 4 Conn. 418.

9. See note below, also vol. 2 of this series, title Injunction.

1. Because he permitted to throw down.

2. Both these actions are obsolete. The preventive remedy is now by *injunction.*

CHAPTER XIV.

OF WASTE.

Waste is a spoil and destruction of the estate, either in houses, woods, or lands, by demolishing not the temporary profits only, but the very substance of the thing, thereby rendering it wild and desolate. [223] **Waste is either voluntary or permissive,** the one by an actual and designed demolition of the lands, woods, and houses; the other arising from mere negligence and want of sufficient care in reparations, fences, and the like.

I. **The persons who may be injured by waste** are such as have some *interest* in the estate wasted; for if a man be the absolute tenant in fee-simple, without any incumbrance or charge on the premises, he may commit whatever waste his own indiscretion may prompt him to, without being impeachable or accountable for it to any one. [224]

One species of interest which is injured by waste is that of a person who has a **right of common** in the place wasted, especially if it be common of *estovers*, or a right of cutting and carrying away wood for housebote, plough-bote, etc.

But the most usual and important interest that is hurt by this commission of waste is that of him who hath the remainder or reversion of the *inheritance,* after a particular estate for life or years in being.[1] Here, if the particular tenant,— be it the tenant in dower or by courtesy, who was answerable for waste at the common law, or the lessee for life or years, who was first made liable by the statutes of Marlbridge and of Gloucester,— commits or suffers any waste, it is a manifest injury to him that has the inheritance. [225] To him, therefore, in remainder and reversion to whom the *inheritance* appertains in expectancy, the law hath given an adequate remedy. **For he who hath the remainder for life only** is not entitled to sue for waste, since his interest may never perhaps come into possession, and then he hath suffered no injury.

1. See *ante,* Waste, and note.

II. **The redress for this injury of waste is of two kinds: preventive and corrective**; the former of which is by writ of *estrepement*, the latter by that of *waste*.

1. **Estrepement**[2] is an old French word signifying the same as waste or extirpation; and the writ of *estrepement* lay at the common law *after* judgment obtained in any action real, and before possession was delivered by the sheriff, to stop any waste which the vanquished party be tempted to commit in lands which were determined to be no longer his. But as in some cases the demandant may be justly apprehensive that the tenant may make waste or *estrepement* pending the suit, well knowing the weakness of his title, therefore the statute of Gloucester gave another writ of *estrepement pendente placito*,[3] commanding the sheriff firmly to inhibit the tenant "*ne faciat vastum vel estrepementum, pendente placito dicto indiscusso.*"[4] [226] And now in an action of waste [obsolete] itself to recover the place wasted, and also damages, a writ of *estrepement* will lie as well before as after judgment.

Besides this preventive redress at common law, the courts of equity, upon bill exhibited therein complaining of waste and destruction, will grant an **injunction in order to stay waste** until the defendant shall have put in his answer, and the court shall thereupon make further order; which is now become the most usual way of preventing waste.[5]

2. **A writ of waste** [obsolete; the remedy now is by an action on the case] is also an action partly founded upon the common law, and partly upon the statute of Gloucester, and may be brought by him who hath the immediate estate of inheritance in reversion or remainder, against the tenant for life, tenant in dower, tenant by courtesy, or tenant for years. This action is also maintainable, in pursuance of statute Westm. 2, by one tenant in common of the inheritance against another who makes waste in the estate holden in common; the equity of which statute extends to joint tenants but not to coparceners, because by the old law coparceners might make partition whenever either of them thought proper, and thereby prevent future waste, but tenants in common and joint-tenants could not, and therefore the statutes gave them this remedy, compelling the defendant either to make partition and take the place wasted to his own share, or to give security not to commit any further waste.

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2. This writ is still in use in Pennsylvania. See 1 Bouvier Law Dict., title Estrepement, § 4; 122 Pa. St. 78.

3. Waste pending the action.

4. That he do not commit waste or devastation during the pendency of the action.

5. See vol. 2 of this series, title Injunction.

This action of waste [obsolete] **is a mixed action,** partly real, so far as it recovers land, and partly personal, so far as it recovers damages; for it is brought for both those purposes. And if the waste be proved the plaintiff shall recover the thing or place wasted, and also treble damages, by the statute of Gloucester.[6] [228]

The defendant on the trial may give in evidence anything that proves there was no waste committed, as that the destruction happened by lightning, tempest, the king's enemies, or other inevitable accident. But it is no defence to say that a stranger did the waste, for against him the plaintiff hath no remedy, though the defendant is entitled to sue such stranger in an action of trespass *vi et armis,* and shall recover the damages he has suffered in consequence of such unlawful act.

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6. The action of trespass on the case is the proper legal remedy of the reversioner to recover his damages.

CHAPTER XV.

OF SUBTRACTION.

Subtraction, which is the fifth species of injuries affecting a man's real property, happens when any person who owes any suit, duty, custom, or service to another, withdraws or neglects to perform it. [230] It differs from a disseisin, in that *this* is committed without any denial of the right, consisting merely of non-performance; *that* strikes at the very title of the party injured, and amounts to an ouster or actual dispossession.

Fealty, suit of court and rents are duties and services usually issuing and arising *ratione tenurae,* being the conditions upon which the ancient lords granted out their lands to their feudatories.

The general remedy for all these is by distress, and it is the only remedy at the common law for the two first of them. [231] A distress is the taking of beasts, or other personal property, by way of pledge to enforce the performance of something due from the party distrained upon. And for the most part it is provided that distresses be reasonable and moderate; but in the case of distress for fealty or suit of court, no distress can be unreasonable, immoderate, or too large, for this is the only remedy to which the party aggrieved is entitled, and therefore it ought to be such as is sufficiently compulsory.

The most usual other remedy, when recourse is had to any action at all for the recovery of pecuniary rents, is by **action of debt** for the breach of the express contract.

CHAPTER XVI.

OF DISTURBANCE.

The sixth and last species of real injuries is that of **disturbance**, which is usually a wrong done to some incorporeal hereditament, by hindering or disquieting the owners in their regular and lawful enjoyment of it. [236] I shall consider five sorts of this injury: viz., 1. Disturbance of *franchises;* 2. Disturbance of *common;* 3. Disturbance of *ways;* 4. Disturbance of *tenure;* 5. Disturbance of *patronage*.

I. **Disturbance of franchises** happens when a man has the franchise of holding a court-leet, of keeping a fair or market, of free-warren, of taking toll, of seising waifs or estrays, or (in short) any other species of franchise whatsoever, and he is disturbed or incommoded in the lawful exercise thereof. To remedy which, as the law has given no other writ, he is therefore entitled to sue for damages by a **special action on the case,** or in case of toll, may take a distress if he pleases. [237]

II. **The disturbance of common** is where any act is done by which the right of another to his common is incommoded or diminished; [the remedies for which are either by distress, action of trespass, or special action on the case, according to the circumstances of the case. For details see text.]

III. **Disturbance of ways** is very similar in its nature to the last; it principally happening when a person who hath a right to a way over another's grounds, by grant or prescription, is obstructed by inclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done. [241] If this be a way annexed to his estate, and the obstruction is made by the tenant of the land, this brings it to another species of injury, for it is then a *nuisance* for which an assise will lie, as mentioned in a former chapter. But if the right of way thus obstructed by the tenant be only *in gross* (that is, annexed to a man's person and unconnected with any lands or tenements), or if the obstruction of a way belonging to a house or land is made by a stranger, it is then in either case merely a disturbance; for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore does not fall under **the legal notion of a nuisance, which must be laid ad nocumentum liberi tenementi,**[1] and the obstruction of it by a stranger can never tend to put the *right* of way in dispute; the remedy, therefore,

1. To the damage of the freehold.

for these disturbances is not by assise or any real action, but by the universal remedy of action on the case to recover damages. [242]

IV. The fourth species of disturbance is that of **disturbance of tenure,** or breaking that connection which subsists between the lord and his tenant, and to which the law pays so high a regard that it will not suffer it to be wantonly dissolved by the act of a third person. To have an estate well tenanted is an advantage that every landlord must be very sensible of, and therefore the driving away of a tenant from off his estate is an injury of no small consequence. So that if there be a tenant at will of any lands or tenements, and a stranger either by menaces and threats, or by unlawful distresses, or by fraud and circumvention, or other means, contrives to drive him away or inveigle him to leave his tenancy, this the law very justly construes to be a wrong and injury to the lord, and gives him a reparation in damages against the offender by a special action on the case.

V. The fifth species of disturbance is that of **disturbance of patronage,** which is an hindrance or obstruction of a patron to present his clerk to a benefice. [Not applicable to this country. As to the remedies by **writ of quare impedit,** etc., see the text.]

CHAPTER XVII.

OF INJURIES PROCEEDING FROM OR AFFECTING THE CROWN.

I. **That the king can do no wrong**[1] is a necessary and fundamental principle of the English constitution, meaning only that in the first place whatever may be amiss in the conduct of public affairs is not chargeable personally on the king, nor is he, but his ministers, accountable for it to the people; and secondly, that the prerogative of the crown extends not to do any injury; for, being created for the benefit of the people, it cannot be exerted to their prejudice. [255] Whenever, therefore, it happens that by misinformation or inadvertence the crown hath been induced to invade the private rights of any of its subjects, though **no action will lie against the sovereign,** yet the law hath furnished the subject with a decent and respectful **mode of removing that invasion,** by informing the king of the true state of the matter in dispute; and as it presumes that to *know* of any injury and to *redress* it are inseparable in the royal breast, it then issues as of course, in the king's own name, his orders to his judges to do justice to the party aggrieved.

It rarely can happen that any **personal injury** can immediately and directly proceed from the prince to any private man; and as it can so seldom happen, the law in decency supposes that it never will or can happen at all, because it feels itself incapable of furnishing any adequate remedy without infringing the dignity and destroying the sovereignty of the royal person, by setting up some superior power with authority to call him to account. **But injuries to the rights of property** can scarcely be committed by the crown without the intervention of its officers, for whom the law in matters of right entertains no respect or delicacy, but furnishes various methods of detecting the errors or misconduct of those agents by whom the king

1. *Rex non potest peccare.* 2 Roll. Rep. 304; Broom's Legal Maxims, *51.

has been deceived and induced to do a temporary injustice.[2]

The common law methods of obtaining possession or restitution from the crown of either real or personal property are: 1. By *petition de droit*, or petition of right. [256] 2. By *monstrans de droit*, manifestation or plea of right,—both of which may be preferred or prosecuted either in the Chancery or Exchequer. [Not applicable to this country.] The former is of use where the king is in full possession of any hereditaments or chattels, and the petitioner suggests such a right as controverts the title of the crown, grounded on facts disclosed in the petition itself,—in which case he must be careful to state truly the whole title of the crown, otherwise the petition shall abate,—and then, upon this answer being endorsed or underwritten by the king, *soit droit fait al partie* (let right be done to the party), a commission shall issue to inquire of the truth of this suggestion; after the return of which the king's attorney is at liberty to plead in bar, and the merits shall be determined upon issue or demurrer, as in suits between subject and subject. But where the right of the party, as well as the right of the crown, appears upon record, there the party shall have *monstrans de droit*, which is putting in a claim of right grounded on facts already acknowledged and established, and praying the judgment of the court, whether upon those facts the king or the subject hath the right. But as this seldom happens, and the remedy by *petition* was extremely tedious and expensive, that by *monstrans* was much enlarged and rendered almost universal by several statutes, particularly 36 Edw. III. c. 13, and 2 & 3 Edw. VI. c. 8, which also allow inquisitions of office to be traversed or denied wherever the right of a subject is concerned, except in a very few cases. [257] These proceedings are had in the petty-bag office in the Court of Chancery; and if upon either of them the right be determined against the crown, the judgment is, *quod manus domini regis amoveantur et possessio restituatur petenti, salvo jure domini regis*, which last clause is always added to judgments against the king, to whom no *laches* is ever imputed, and whose **right (till some late statutes) was never defeated by any limitation or length of time.** And by such judgment the crown is instantly out of possession, so that there needs not the indecent interposition of his own officers to transfer the seisin from the king to the party aggrieved.

II. The methods of redressing such injuries as the crown may receive from the subject are,—

1. By such usual common law actions as are consistent

2. Unless by statute or constitution an action against the state is permitted, the only remedy against a state is by petition. Cooley's Const. Lim. (7th Ed.), 23.

with the royal prerogative and dignity.[3] As, therefore, the king, by reason of his legal ubiquity, cannot be disseised or dispossessed of any real property which is once vested in him, he can maintain no action which supposes a dispossession of the plaintiff, such as an assise or an ejectment; but he may bring a *quare impedit,* and he may prosecute this writ, like every other by him brought, as well in the King's Bench as the Common Pleas, or in whatever court he pleases. So too he may bring an action of trespass for taking away his goods; but such actions are not usual (though in strictness maintainable) for breaking his close, or other injury done upon his soil or possession.

2. **Inquisition or inquest of office,** which is an inquiry made by the king's officer, his sheriff, coroner, or escheator, *virtute officii,*[4] or by writ to them sent for that purpose, or by commissioners specially appointed, concerning any matter that entitles the king to the possession of lands or tenements, goods or chattels. [258] This is done by a jury of no determinate number, being either twelve, or less, or more.

These inquests of office were devised by law as an authentic means to give the king his right by solemn matter of record, without which he in general can neither take nor part from anything. [259] With regard to real property, if an office be found for the king, it puts him in immediate possession without the trouble of a formal entry, provided a subject in the like case would have had a right to enter, and the king shall receive all the mesne or intermediate profits from the time that his title accrued. [260] In order to avoid the possession of the crown acquired by the finding of such office, the subject may not only have his *petition of right,* which discloses new facts not found by the office, and his *monstrans de droit,* which relies on the facts as found, but also he may (for the most part) *traverse* or deny the matter of fact itself, and put it in a course of trial by the common law process of the Court of Chancery;

3. A state may sue a private person or a corporation in its own courts or the courts of another state in the same manner as an individual. As to controversies to which the United States is a party or between two or more states, see Cooley Const. Lim. (7th Ed.), 23.

4. By virtue of his office.

An inquest of office, or office found, is a not uncommon means of enforcing a forfeiture of real estate to the state or of enforcing an escheat of lands in the several states. Consult the local statutes. See 1 Bouvier Law Dict., Inquest, §§ 1, 2.

yet still, in some special cases, he hath no remedy left but a mere petition of right. These *traverses* as well as the *monstrans de droit* were greatly enlarged and regulated for the benefit of the subject by the statutes before mentioned and others. And in the traverses thus given by statute, which came in the place of the old petition of right, the party traversing is considered as the plaintiff, and must therefore make out his own title as well as impeach that of the crown, and then shall have judgment *quod manus domini regis amoveantur*, etc.

3. Where the crown hath unadvisedly granted anything by letters patent which ought not to be granted, or where the patentee hath done an act that amounts to a forfeiture of the grant, the remedy to repeal the patent is by **writ of scire facias**[5] in Chancery. [261] This may be brought either on the part of the king in order to resume the thing granted, or if the grant be injurious to a subject the king is bound of right to permit him (upon his petition) to use his royal name for repealing the patent in a *scire facias*. And so also if upon office untruly found for the king he grants the land over to another, he who is grieved thereby, and traverses the office itself, is entitled before issue joined to a *scire facias* against the patentee, in order to avoid the grant.

4. **An information** on behalf of the crown, filed in the Exchequer by the king's Attorney-General, is a method of suit for recovering money or other chattels, or for obtaining satisfaction in damages for any personal wrong committed in the lands or other possessions of the crown. It differs from an information filed in the Court of King's Bench (of which we shall treat in the next book), in that *this* is instituted to redress a private wrong by which the property of the crown is affected, *that* is calculated to punish some public wrong or heinous misdemeanor in the defendant. It is grounded on no writ under seal, but merely on the inti-

5. This is a judicial writ founded upon a record requiring the defendant to *show cause* why the plaintiff should not have the advantage of such record or why the record should not be annulled and vacated. 1 Bouvier Law Dict., *scire facias;* Graham's Practice, 649; 2 Tidd's Prac. 982; 2 Arch. Prac. 76; 1 Green's New Prac. ch. 15, sec. 1, p. *669; Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), ch. 15.

mation of the king's officer, the Attorney-General, who "gives the court to understand and be informed of" the matter in question, upon which the party is put to answer, and trial is had as in suits between subject and subject. The most usual informations are those of *intrusion* and *debt: intrusion* for any trespass committed on the lands of the crown, as by entering thereon without title, holding over after a lease is determined, taking the profits, cutting down timber, or the like; and *debt* upon any contract for moneys due to the king, or for any forfeiture due to the crown upon the breach of a penal statute. This is most commonly used to recover forfeitures occasioned by transgressing those laws which are enacted for the establishment and support of the revenue; others which regard mere matters of police and public convenience being usually left to be enforced by common informers in the *qui tam* informations or actions of which we have formerly spoken. [262] But after the Attorney-General has informed upon the breach of a penal law, no other information can be received. **There is also an information in rem** when any goods are supposed to become the property of the crown and no man appears to claim them or to dispute the title of the king; as anciently in the case of treasure-trove, wrecks, waifs, and estrays seized by the king's officer for his use. Upon such seizure an information was usually filed in the king's Exchequer, and thereupon a proclamation was made for the owner (if any) to come in and claim the effects, and at the same time there issued a commission of *appraisement* to value the goods in the officer's hands; after the return of which, and a second proclamation had, if no claimant appeared the goods were supposed derelict, and condemned to the use of the crown. And when in later times forfeitures of the goods themselves, as well as personal penalties on the parties, were inflicted by act of parliament for transgressions against the laws of the customs and excise, the same process was adopted in order to secure such forfeited goods for the public use, though the offender himself had escaped the reach of justice.

5. **A writ of quo warranto**[6] is in the nature of a writ of right for the king against him who claims or usurps any office, franchise, or liberty, to inquire by what authority he supports his claim, in order to determine the right. It lies also in case of non-user or long neglect of a franchise, or mis-user or abuse of it, being a writ commanding the defendant to show by what warrant he exercises such a franchise, having never had any grant of it, or having forfeited it by neglect or abuse. Writs of *quo warranto* (if brought at all) must now be prosecuted and determined before the king's justices at Westminster. [263] And in case of **judgment** for the defendant, he shall have an allowance of his franchise; but in case of judgment for the king, for that the party is entitled to no such franchise, or hath disused or abused it, the franchise is either seized into the king's hands, to be granted out again to whomever he shall please, or if it be not such a franchise as may subsist in the hands of the crown, there is merely judgment of *ouster,* to turn out the party who usurped it.

A more modern method of prosecution is by information filed in the Court of King's Bench by the Attorney-General, in the nature of a writ of *quo warranto*[7] wherein the process is speedier and the judgment not quite so decisive. This is properly a criminal method of prosecution, as well to punish the usurper by a fine for the usurpation of the franchise, as to oust him or seize it for the crown, but hath long been applied to the mere purposes of trying the civil right, seizing the franchise, or ousting the wrongful possessor, the fine being nominal only.

This proceeding is now applied to the decision of corporation disputes between party and party, without any intervention of the prerogative, by virtue of the statute 9 Anne, c. 20, which permits an information in nature of *quo*

6. By what warrant or authority. See next note below.

7. This is in this country the common method, where not changed by statute, as it has been in many instances, of trying the title to an office or the right to exercise the franchise of being a corporation. Consult the local statutes. See, also, Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), ch. 18, p. 565; 1 Green's New Prac. *16.

warranto to be **brought with leave of the court**, at the relation of any person desiring to prosecute the same (who is then styled the *relator*), against any person usurping, intruding into, or unlawfully holding any franchise or office in any city, borough, or town corporate, provides for its speedy determination, and directs that if the defendant be convicted judgment of ouster (as well as a fine) may be given against him, and that the relator shall pay or receive costs according to the event of the suit. [264]

6. **The writ of mandamus** is also made by the same statute, 9 Anne, c. 20, a most full and effectual remedy, in the first place for refusal of admission where a person is entitled to an office or place in any such corporation, and secondly, for wrongful removal when a person is legally possessed.[8]

8. See *ante*, *350 and note.

CHAPTER XVIII.

OF THE PURSUIT OF REMEDIES BY ACTION, AND FIRST, OF THE ORIGINAL WRIT.

In treating of remedies by action at common law, I shall confine myself to **the modern method of practice** in our courts of judicature[1] [271]; and what the student may expect in this and the succeeding chapters is an account of the method of proceeding in and prosecuting a suit upon any of the personal writs we have before spoken of in the Court of *Common Pleas* at Westminster, that being the court originally constituted for the prosecution of all civil actions. In giving an abstract or history of the progress of a suit through the Court of Common Pleas,[2] we shall at

1. In the United States, imprisonment for debt being generally abolished, the most usual method of commencing an action is by summons issued out of and returnable to the court which is to try the cause. In cases of tort and in some cases of debts fraudulently contracted, upon making affidavit of the facts and obtaining an order to hold to bail a suit may in some states be commenced by *capias*. No original writ, in the sense used by the author, is in use in this country.

Actions may, in some states, be commenced in several ways. Thus in Michigan in a case in which an arrest would be warranted by law, the action may be commenced by an ordinary summons, by the entry of a rule to plead and service of the declaration with notice of such rule indorsed thereon and upon obtaining the proper order, filing bonds, etc., by a *capias* or an attachment. In many states actions are begun by filing a petition and the issuance of a summons, or by serving a copy of the petition.

In the federal district courts, except in admiralty and equity cases, the same pleading and practice prevails as in the state in which the court is held, as nearly as may be applicable. Rev. Stat. U. S., secs. 914-916.

The student should consult the local statutes and books of practice. The method set forth in the text should be studied, as it is the foundation of more modern practice and necessary to its full understanding.

2. The student will do well to read the following remarks of our author found in his note to page *271: "In deducing this history the student must not expect authorities to be constantly cited; as practical knowledge is not so much to be learned from any books of law, as from experience and attendance on the courts. The compiler must therefore be frequently obliged to rely upon his own observations; which in general he hath been studious to avoid where those of any other might be had. To accom-

the same time give a general account of the proceedings of the other two courts; taking notice, however, of any considerable difference in the local practice of each. [272]

The general and orderly parts of a suit are these: 1. The original writ. 2. The process. 3. The pleadings. 4. The issue or demurrer. 5. The trial. 6. The judgment and its incidents. 7. The proceedings in nature of appeals. 8. The execution.

First, then, **of the original**, or original writ, which is the beginning or foundation of the suit. When a person hath received an injury and thinks it worth his while to demand a satisfaction for it, he is to consider with himself or take advice what redress the law has given for that injury, and thereupon is to make application or suit to the crown, the fountain of all justice, for that particular specific remedy which he is determined or advised to pursue. [273] To this end he is to sue out, or purchase by paying the stated fees, an *original,* or original writ, **from the Court of Chancery,** which is the *officina justitiae,* the shop or mint of justice, wherein all the king's writs are framed. **It is a mandatory letter from the king** in parchment, sealed with his great seal, and directed to the sheriff of the county wherein

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pany and illustrate these remarks, such gentlemen as are designed for the profession will find it necessary to peruse the books of *entries*, ancient and modern; which are transcripts of proceedings that have been had in some particular actions. A book or two of technical learning will also be found very convenient; from which a man of liberal education and tolerable understanding may glean *pro re nata* as much as is sufficient for his purpose. These *books of practice*, as they are called, are all pretty much on a level, in point of composition and solid instruction; so that that which bears the latest edition is usually the best. But *Gilbert's history and practice of the court of common pleas* is a book of a very different stamp; and though (like the rest of his posthumous works) it has suffered most grossly by ignorant or careless transcribers, yet it has traced out the reason of many parts of our modern practice from the feodal institutions and the primitive construction of our courts, in a most clear and ingenious manner."

The student may also, when examining a question of common law practice or procedure, consult with profit, Tidd's Practice; Chitty's General Practice; Graham's (N. Y.) Practice; Burrill's (N. Y.) Practice; Puterburgh's Com. Law, Plead. & Practice (7th Ed.); Green's New Practice, and Hughe's Federal Procedure. The local statutes and works on Practice should of course always be consulted.

the injury is committed or supposed so to be, requiring him to command the wrong-doer or party accused either to do justice to the complainant, or else to appear in court and answer the accusation against him. Whatever the sheriff does in pursuance of this writ he must return or certify to the Court of Common Pleas, together with the writ itself, which is the foundation of the jurisdiction of that court, being the king's warrant for the judges to proceed to the determination of the cause.[3]

Original writs are either optional or peremptory, or, in the language of our lawyers, they are either a *praecipe* or a *si te fecerit securum.* [274] **The praecipe** is in the alternative, commanding the defendant to do the thing required, or show the reason wherefore he hath not done it. The use of this writ is where something certain is demanded by the plaintiff which it is incumbent on the defendant himself to perform. The other species of original writs is called a **si fecerit te securum,** from the words of the writ, which directs the sheriff to cause the defendant to appear in court without any option given him, provided the plaintiff gives the sheriff security effectually to prosecute his claim. This writ is in use where nothing is specifically demanded, but only a satisfaction in general, to obtain which and minister complete redress the intervention of some judicature is necessary. Such are writs of trespass or on the case, wherein no debt or other specific thing is sued for in certain, but only damages to be assessed by a jury. Both species of writs are **tested**[4] or witnessed in the king's own name,—"witness ourselves at Westminster," or wherever the Chancery may be held. **The security** here spoken of to be given by the plaintiff for prosecuting his claim, is common to both writs, though it gives denomination only to the latter. [275] The whole of it is at present become a mere matter of form, and John Doe and Richard Roe are always returned as the standing pledges for this purpose.

The day on which the defendant is ordered to appear in court, and on which the sheriff is to bring in the writ and report how far he has obeyed it, is called the return of the writ, it being then returned by him to the king's justices at Westminster.[5] And it is always made returnable at the distance of at least fifteen days from the date or *teste,* that the defendant may have time to come up to Westminster, even from the most

3. Original writs are no longer used in this country.

4. The *teste* of any writ is important even now. Consult the statutes and constitution.

5. The return to the writ as to the manner of service is indorsed thereon and signed by the sheriff, marshal or other officer authorized by law to make the service. If served by a deputy the return should be signed in the name of his principal by himself as deputy.

remote parts of the kingdom, and upon some day in one of the four **terms** in which the court sits for the despatch of business.

There are in each of these terms stated days called **days in bank,** *dies in banco,* that is, days of appearance in the court of common bench. [277] They are generally at the distance of about a week from each other, and have reference to some festival of the Church. On some one of these days in bank all original writs must be made returnable, and therefore they are generally called the **returns** of that *term.* But though many of the return days are fixed upon **Sundays,** yet the court never sits to receive these returns till the Monday after, and therefore no proceedings can be held or judgment can be given, or supposed to be given, on the Sunday.

The first return in every term is, properly speaking, the first day in that term. [278] And thereon the court sits to take **essoigns,** or excuses for such as do not appear according to the summons of the writ; wherefore this is usually called the *essoign day* of the term. But on every return-day in the term the person summoned has **three days of grace** beyond the day named in the writ in which to make his appearance; and if he appears on the fourth day inclusive, *quarto die post,* it is sufficient. Therefore at the beginning of each term the court does not usually sit for despatch of business till the *fourth* or *appearance* day.

CHAPTER XIX.

OF PROCESS.

The next step for carrying on the suit, after suing out the original, is called the **process, being the means of compelling the defendant to appear in court.**[1] [279] This is sometimes called **original** process, being founded upon the original writ, and also to distinguish it from **mesne,** or intermediate process, which issues, pending the suit upon some collateral interlocutory matter, as to summon juries, witnesses, and the like. *Mesne* process is also sometimes put in contradistinction to **final** process, or process *of execution,* and then it signifies all such process as intervenes between the beginning and end of a suit.

But process, as we are now to consider it, is the method taken by the law to compel a compliance with the original writ, of which the primary step is by giving the party notice to obey it. This notice is given upon all real *praecipes,* and also upon all personal writs for injuries not against the peace, by **summons,** which is a warning to appear in court at the return of the original writ, given to the defendant by two of the sheriff's messengers, called *summoners,* either in person or left at his house or land.

If the defendant disobeys this verbal monition, the next process is by writ of **attachment,**[2] or **pone,** so called from the words of the writ, "*pone per vadium et salvos plegios,* put by gage and safe pledges A. B. the defendant, etc." [280] This is a writ not issuing out of Chancery, but out of the Court of Common Pleas, being grounded on the non-appearance of the defendant at the return of the original writ; and thereby the sheriff is commanded to attach him, by taking *gage,* that is, certain of his goods, which he shall forfeit if he doth not appear, or by making him find *safe pledges* or sureties, who shall be amerced in case of his non-appearance. This is also the first and immediate process, without any previous summons, upon actions of trespass *vi et armis* or for other injuries, which, though not forcible, are yet trespasses against the peace, as *deceit* and *conspiracy,*

1. In this country process to compel an appearance, in the sense of the author, is not in use, but if the defendant does not appear, but makes default, he is regarded as confessing the plaintiff's demand, and judgment may be taken against him by default.

2. This is not the statutory writ of attachment so commonly used against fraudulent debtors.

If after attachment the defendant neglects to appear, he not only forfeits this security, but is moreover to be further compelled by writ of **distringas,** or *distress infinite*, which is a subsequent process issuing from the Court of Common Pleas, commanding the sheriff to distrain the defendant from time to time, and continually afterwards, by taking his goods and the profits of his lands, which are called *issues*, and which by the common law he forfeits to the king if he doth not appear. But now the issues may be sold, if the court shall so direct, in order to defray the reasonable costs of the plaintiff.

And here by the common as well as the civil law the process ended in case of injuries without force. [281] But in case of injury accompanied with force, the law, to punish the breach of the peace and prevent its disturbance for the future, provided also a process against the defendant's *person* in case he neglected to appear upon the former process of attachment or had no substance whereby to be attached, subjecting his body to imprisonment by the writ of **capias ad respondendum.**[3] But this immunity of the defendant's person, in case of peaceable though fraudulent injuries, producing great contempt of the law in indigent wrongdoers, **a capias was also allowed to arrest the person** in actions of *account*, though no breach of the peace be suggested, by the statutes of Marlbridge, 52 Hen. III. c. 23, and Westm. 2, 13 Edw. I. c. 11, in actions of *debt* and *detinue* by statute 25 Edw. III. c. 17, and in all actions *on the case* by statute 19 Hen. VII. c. 9.

If, therefore, the defendant, being summoned or attached, makes default and neglects to appear, or if the sheriff returns a *nihil*, or that the defendant hath nothing whereby he may be summoned, attached, or distrained, the **capias** now usually issues, being a writ commanding the sheriff to *take* the body of the defendant if he may be found in his bailiwick or county, and him safely to keep, so that he may have him in court on the day of the return to answer to the plaintiff of a plea of debt or trespass, etc., as the case may be. [282] This writ and all others subsequent to the original writ not issuing out of Chancery, but from the court into which the original was returnable, and being grounded on what has passed in that court in consequence of the sheriff's return, are called **judicial, not original, writs.** They issue under the private seal of that court and not under the Great Seal of England, and are *tested*, not in the king's name, but in that of the chief (or, if there be no chief, of the senior) justice only.[4] And these several writs being grounded on

3. Take to answer.

4. See the constitution and local statutes as to *teste*, etc., of writs. For example, in Michigan (Const., art. 6, sec. 35), process must run "In the name of the people of the state of Michigan," be tested in the name of the circuit judge, and must be dated on the day it issues, be sealed with the seal of the court from which it issues and made returnable on the first day of the next succeeding term.

It must be directed to the sheriff of the same county; or, if the sheriff is a party to the suit, then to the coroner, etc. See 1 Green's New Prac-

the sheriff's return, must respectively bear date the same day on which the writ immediately preceding was returnable.

This is the regular and ordinary method of process. **But it is now usual in practice to sue out the capias in the first instance,** upon a supposed return of the sheriff, especially if it be suspected that the defendant, upon notice of the action, will abscond; and afterwards a fictitious original is drawn up, if the party is called upon so to do, with a proper return thereupon, in order to give the proceedings a color of regularity. **When this capias is delivered to the sheriff,** he by his under-sheriff grants a warrant to his inferior officers or bailiffs to execute it on the defendant. And if the sheriff of Oxfordshire (in which county the injury is supposed to be committed and the action is laid) cannot find the defendant in his jurisdiction, he returns that he is not found, **non est inventus,**[5] in his bailiwick, whereupon another writ issues, called a **testatum capias,** directed to the sheriff of the county where the defendant is supposed to reside, as of Berkshire, reciting the former writ, and that it is *testified* (*testatum est*) that the defendant lurks or wanders in *his* bailiwick, wherefore he is commanded to take him as in the former *capias*. [283] But here, also, when the action is brought in one county and the defendant lives in another, it is usual, for saving trouble, time, and expense, to make out a *testatum capias* at the first, supposing not only an original but a former *capias* to have been granted, which in fact never was. And this fiction, being beneficial to all parties, is readily acquiesced in, and is now become the settled practice.

But where a defendant absconds, and the plaintiff would proceed to an **outlawry** against him, an original writ must then be sued out regularly, and after that a *capias*. [Outlawry in civil cases is abolished in this country.] And if the sheriff cannot find the defendant upon the first writ of *capias*, and return a *non est inventus*, there issues out an **alias**[6] writ, and after that a **pluries,**[7] to the same effect as the former, only after these words, "we command you," this clause is inserted: "as we have *formerly*," or, "as we have *often* commanded you" ("*sicut* alias," or "*sicut* pluries, *præcipimus*"). And if a *non est inventus* is returned upon all of them, then a writ of **exigent,** or *exigi facias*,[8] may be sued out, which requires the sheriff to cause the defendant to be proclaimed, required, or exacted in five county courts successively to render himself, and if he does, then to take him as in a *capias;* but if he does not appear, and is returned *quinto exactus*,[9] he shall then be outlawed by the coroners of the county. Also, by statutes 6 Hen. VIII. c. 4, and 31 Eliz. c. 3, whether the defendant dwells within the same or another county than that wherein the *exigent* is sued out, **a writ of proclamation** shall

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tice, 107; Puterburgh Com. Law, Plead. & Prac. (7th Ed.), 22; Const. Ill., art. 6, sec. 33; Parris v. People, 76 Ill. 274; Sidewell v. Schumacher, 99 id. 426.

5. He has not been found.
6. Another.
7. Several.
8. Cause to be required.
9. Called the fifth time.

issue out at the same time with the *exigent*, commanding the sheriff of the county wherein the defendant dwells to make three proclamations thereof in places the most notorious and most likely to come to his knowledge a month before the outlawry shall take place. [284] Such **outlawry** is putting a man out of the protection of the law, so that he is incapable to bring an action for redress of injuries, and it is also attended with a forfeiture of all one's goods and chattels to the king. **If after outlawry the defendant appears publicly,** he may be arrested by a writ of *capias utlagatum*[1] and committed till the outlawry be reversed; which reversal may be had by the defendant's appearaing personally in court or by attorney (though in the King's Bench he could not appear by attorney till permitted by statute 4 & 5 W. & M. c. 18), and any plausible cause, however slight, will in general be sufficient to reverse it, it being considered only as a process to compel an appearance. But then the defendant must pay full costs, and put the plaintiff in the same condition as if he had appeared before the writ of *exigi facias* was awarded.

Such is the first process in the Court of *Common Pleas*. **In the King's Bench** they *may* also (and frequently *do*) proceed in certain causes, particularly in actions of ejectment and trespass, by *original* writ, with *attachment* and *capias* thereon, returnable, not at Westminster, where the Common Pleas are now fixed in consequence of *Magna Carta*, but "*ubicunque fuerimus in Anglia*,"[2] wheresoever the king shall then be in England. [285] But the more usual method of proceeding therein is without any original, but by a peculiar species of process entitled a **bill of Middlesex,** and therefore so entitled because the court now sits in that county; for if it sat in *Kent*, it would then be a *bill of Kent*. The bill of Middlesex, which was formerly always founded on a *plaint* of trespass *quare clausum fregit*[3] entered on the records of the court, is a kind of *capias* directed to the sheriff of that county, and commanding him to take the defendant and have him before our lord the king at Westminster on a day prefixed to answer to the plaintiff of a plea of trespass. For this accusation of trespass it is that gives the Court of King's Bench jurisdiction in other civil causes, as was formerly observed, since when once the defendant is taken into custody of the marshal or prison-keeper of this court for the supposed trespass, he, being then a prisoner of this court, may here be prosecuted for any other species of injury. Yet in order to found this jurisdiction it is not necessary that the defendant be actually the marshal's prisoner, for as soon as he appears or puts in bail to the process he is deemed by so doing to be in such custody of the marshal as will give the court a jurisdiction to proceed. [286] And upon these accounts in the bill or process a complaint of trespass is always suggested, whatever else may be the real cause of action. This bill of Middlesex must be served on the de-

1. Take the outlaw.
2. Wherever we are in England.
3. Wherefore he broke and entered.

fendant by the sheriff if he finds him in that county, but if he returns "*non est inventus*," then there issues out a **writ of latitat** to the sheriff of another county, as Berks, which is similar to the *testatum capias* in the Common Pleas, and recites the bill of Middlesex and the proceedings thereon, and that it is testified that the defendant "*latitat et discurrit*," lurks and wanders about in Berks, and therefore commands the sheriff to take him and have his body in court on the day of the return. But as in the Common Pleas the *testatum capias* may be sued out upon only a supposed and not an actual preceding *capias*, so in the King's Bench a *latitat* is usually sued out upon only a supposed and not an actual *bill of Middlesex*. So that in fact a *latitat* may be called the first process in the Court of King's Bench, as the *testatum capias* is in the Common Pleas. Yet, as in the Common Pleas, if the defendant lives in the county wherein the action is laid, a common *capias* suffices; so in the King's Bench, likewise, if he lives in Middlesex, the process must still be by *bill of Middlesex* only.

In the Exchequer the first process is by writ of quo minus, in order to give the court a jurisdiction over pleas between party and party; in which writ the plaintiff is alleged to be the king's farmer or debtor, and that the defendant hath done him the injury complained of, *quo minus sufficiens exisit*,[4] by which he is the less able to pay the king his rent or debt. And upon this the defendant may be arrested as upon a *capias* from the Common Pleas.

Thus differently do the three courts set out at first in the commencement of a suit. **Afterwards,** when the cause is once drawn into the respective courts, the method of pursuing it is pretty much the same in all of them.

If the sheriff has found the defendant upon any of the former writs—the *capias*, *latitat*, etc.—he was anciently obliged to take him into custody, in order to produce him in court upon the return, however small and minute the cause of action might be. [287] For, not having obeyed the original summons, he had shown a contempt of the court, and was no longer to be trusted at large. But when the summons fell into disuse, and the *capias* became in fact the first process, it was thought hard to imprison a man for a contempt which was only supposed, and therefore in common cases, by the gradual indulgence of the courts (at length authorized by statute 12 Geo. I. c. 29, which was amended by 5 Geo. II. c. 27, made perpetual by 21 Geo. II. c. 3, and extended to all inferior courts by 19 Geo. III. c. 70), **the sheriff or proper officer can now only personally serve the defendant with the copy of the writ or process, and with notice in writing to appear** by his attorney in court to defend this action, which in effect reduces it to a mere summons. And if the defendant thinks proper to appear upon this notice, his appearance is recorded, and he puts in sureties for his future attendance and obedi-

4. By which less than enough remains.

ence; which sureties are called **common bail,** being the same two imaginary persons that were pledged for the plaintiff's prosecution, John Doe and Richard Roe. **Or, if the defendant does not appear** upon the return of the writ, or within four (or, in some cases, eight) days after, the plaintiff may enter an appearance to him as if he had really appeared, and may file common bail in the defendant's name, and proceed thereupon as if the defendant had done it himself.

But if the plaintiff will make affidavit, or assert upon oath, that the cause of action amounts to ten pounds or upwards, then he may arrest the defendant and make him put in substantial sureties for his appearance, called **special bail;**[5] in order to which it is required by statute 13 Car. II. st. 2, c. 2, that the true cause of action should be expressed in the body of the writ or process, else no security can be taken in a greater sum than 40*l.* This statute (without any such intention in the makers) had like to have ousted the King's Bench of all its jurisdiction over civil injuries without force; for, as the bill of Middlesex was framed only for actions of trespass, a defendant could not be arrested and held to bail thereupon for breaches of civil contracts. [288] But to remedy this inconvenience the officers of the King's Bench devised a method of adding what is called a **clause of ac etiam** to the usual complaint of trespass, the bill of Middlesex commanding the defendant to be brought in to answer the plaintiff of a plea of trespass *and also* to a bill of debt,—the complaint of trespass giving cognizance to the court, and that of debt authorizing the arrest. The sum sworn to by the plaintiff is marked upon the back of the writ, and the sheriff or his officer, the bailiff, is then obliged actually to arrest or take into custody the body of the defendant, and having so done to return the writ with a *cepi corpus* indorsed thereon.

An arrest must be by corporal seizing or touching the defendant's body,[6] after which the bailiff may justify

5. Arrest for a simple debt has been abolished by statute in most, if not all the states; but in many states if the debt was contracted by fraud or there has been a fraudulent attempt to evade payment, etc., and in most cases of tort the plaintiff by making a proper showing on oath may procure an order for the arrest of the defendant on *capias,* under which he will be compelled to give special bail or bail to the action or be confined in jail. In all the states also, there will probably be found statutes authorizing the attachment of the property of the defendant as security for the plaintiff's claim upon making the requisite affidavit and giving bond as required by statute. Proceedings by garnishment are also authorized probably in all the states. See, generally, Drake on Attachment; Waples on Attachment & Garnishment; Bradner on Attachment, and the local statutes.

6. Mere words will not constitute an arrest. A submission, however, to reasonably apprehended force is sufficient to constitute an unlawful imprisonment though no force is used or threatened. Cooley on Torts (Stu-

breaking open the house in which he is to take him; otherwise he has no such power, but must watch his opportunity to arrest him. **For every man's house is looked upon by the law to be his castle** of defence and asylum, wherein he should suffer no violence.[7] Peers of the realm, members of parliament, and corporations are **privileged from arrests,**[8] and of course from outlawries. [289] And against them the process to enforce an appearance must be by summons and distress infinite, instead of a *capias*. Also clerks, attorneys, and all other persons attending the courts of justice (for attorneys, being officers of the court, are always supposed to be there attending) are not liable to be arrested by the ordinary process of the court, but must be sued by *bill* (called usually a *bill of privilege*)[9] as being personally pres-

dents' Ed.), 158 and note; Brushaber v. Stegeman, 22 Mich. 266. So that it is not absolutely necessary that there be a corporal seizing or touching as stated in the text; for if a bailiff come into a room and tell the defendant he arrests him, and lock the door, it is sufficient. C. T. Hardw. 301; 2 New Rep. 211; Bull. N. P. 82. See also authorities cited above.

7. It is the defendant's own dwelling which by law is said to be his castle; for if he be in the house of another, the bailiff or sheriff may break and enter it to effect his purpose, but he ought to be very certain that the defendant be, at the time of such forcible entry, in the house. See Johnson v. Leigh, 6 Taunt. 246. A bailiff before he has made the arrest cannot break open an outer door of a house; but if he enter the outer door peaceably, he may then break open the inner door, though it be the apartment of a lodger, if the owner himself occupies part of the house. Cowp. 1; 2 Moore, 207; 8 Taunt. 250, S. C. But if the whole house be let in lodgings, as each lodging is then considered a dwelling-house, in which burglary may be stated to have been committed, it has been supposed that the door of each apartment would be considered an outer door, which could not be legally broken open to execute an arrest. Cowp. 2. But to justify breaking open an inner door belonging to a lodger, admittance must be first demanded, unless defendant is in the room. 3 B. & P. 223; 4 Taunt. 619. And the breaking upon an inner door of a stranger cannot be justified on a suspicion that defendant is in the room. 5 Taunt. 765, 6 ed. 246.

8. Members of parliament, members of Congress and the various state legislative bodies while in attendance thereon, ambassadors and their households are privileged from civil arrest, the extent of the privilege not always being the same. For details, see Cooley Const. Lim. (7th Ed.), 192 and notes, *ante*, Book 1, p. *46 and note.

9. Not applicable to this country. When suable at all the same process is used as in other cases.

ent in court. Clergymen performing divine service, and not merely staying in the church with a fraudulent design, are for the time privileged from arrests, by stat. 50 Edw. III. c. 5, and 1 Ric. II. c. 16, as likewise members of Convocation actually attending thereon, by statute 8 Hen. VI. c. 1 [not applicable to this country]. Suitors, witnesses, and other persons necessarily attending any courts of record upon business are not to be arrested during their actual attendance, which includes their necessary coming and returning. And no arrest can be made in the king's presence, nor within the verge of his royal palace, nor in any place where the king's justices are actually sitting. And, lastly, by statute 29 Car. II. c. 7, no arrest can be made, nor process served upon a Sunday, except for treason, felony, or breach of the peace.[1] [290]

When the defendant is regularly arrested, he must either go to prison, for safe custody, or put in **special bail** to the sheriff. **The method of putting in bail** to the sheriff is by entering into a bond or obligation, with one or more sureties, not fictitious persons, as in the former case of common bail, but real, substantial, responsible bondsmen, to insure the defendant's appearance at the return of the writ; which obligation is called the *bail-bond*.[2] The sheriff, if he pleases, *may* let the defendant go without any sureties, but that is at his own peril; for after once taking him the sheriff is bound to keep him safely so as to be forthcoming in court, otherwise an action lies against him for an escape. But on the other hand he is obliged, by statute 23 Hen. VI. c. 10, to take (if it be tendered) a sufficient bail-bond; and by statute 12 Geo. I. c. 29, the sheriff shall take bail for no other sum than such as is sworn to by the plaintiff and endorsed on the back of the writ.

Upon the return of the writ, or within four days after, the defendant must **appear** according to the exigency of the writ. This *appearance* is effected by putting in and justifying **bail to the action,**[2] which is commonly called

1. The American law is, in most respects, similar; but in every case the local statutes must be consulted.

2. As to the manner of putting in and perfecting special bail and bail to the action, consult the local statutes and books on Practice.

putting in bail *above*. If this be not done, and the bail that were taken by the sheriff *below* are responsible persons, the plaintiff may take an assignment from the sheriff of the bail-bond (under the statute 4 & 5 Anne, c. 16), and bring an action thereupon against the sheriff's bail. [291] But if the bail so accepted by the sheriff be insolvent persons, the plaintiff may proceed against the sheriff himself by calling upon him, first, to return the writ (if not already done), and afterwards to bring in the body of the defendant. And if the sheriff does not then cause sufficient bail to be put in and perfected *above*, he will himself be responsible to the plaintiff.[3]

The bail *above*, or bail *to the action*, must be put in either in open court or before one of the judges thereof, or else in the country before a commissioner appointed for that purpose by virtue of the statute 4 W. & M. c. 4, which must be transmitted to the court. These bail, who must at least be two in number, must enter into a recognizance in court or before the judge or commissioner, in a sum equal (or in some cases double) to that which the plaintiff hath sworn to, whereby they do jointly and severally undertake, that if the defendant be condemned in the action he shall pay the costs and condemnation, or render himself a prisoner, or that they will pay it for him, which recognizance is transmitted to the court in a slip of parchment entitled a **bail piece.** And, **if excepted to,** the bail must be **perfected,** that is, they must **justify** themselves in court, or before the commissioner in the country, by swearing themselves housekeepers, and each of them to be worth the full sum for which they are bail, after payment of all their debts.[4] **Special bail may be discharged** by surrendering the defendant into custody within the time allowed by law, for which purpose they are at all times entitled to warrant to apprehend him. [292]

Special bail is required (as of course) only upon actions of debt, or actions on the case in trover or for money due,

3. Similar rules will be found to exist in some of the states. Consult the local books on Practice.

4. See local statutes.

where the plaintiff can swear that the cause of action amounts to ten pounds; but in actions where the damages are precarious, being to be assessed *ad libitum*[5] by a jury, as in actions for words, ejectment, or trespass, it is very seldom possible for a plaintiff to swear to the amount of his cause of action, and therefore no special bail is taken thereon, unless by a judge's order or the particular directions of the court, in some peculiar species of injuries, as in cases of mayhem or atrocious battery, or upon such special circumstances as make it absolutely necessary that the defendant should be kept within the reach of justice. Also in actions against heirs, executors, and administrators, for debts of the deceased, special bail is not demandable; for the action is not so properly against them in person as against the effects of the deceased in their possession. But special bail is required even of them in actions for a *devastavit*, or wasting the goods of the deceased, that wrong being of their own committing.

5. At pleasure.

CHAPTER XX.

OF PLEADING.[1]

Pleadings are the mutual altercations between the plaintiff and defendant, which at present are set down and delivered into the proper office in writing, though formerly they were usually put in by their counsel *ore tenus* or *viva*

1. After an experience of many years as a teacher of common law pleading and practice, it is our deliberate judgment that a thorough knowledge of the elements of common law pleading and practice is the best preparation for the practice of the law in any jurisdiction whether it has the common law or so-called code procedure and that one having such knowledge will experience no difficulty in adopting any other system. No attempt will therefore be made to give the details of any other system than that of the common law. There are several works on elementary common law pleading, each so excellent, that to us the one last read (and we have read them often) seems the best. Stephens' Pleading and Gould's Pleading are most excellent works; and an old edition will do as well as the most recent, if not better; for with the most recent editions of these works it is not always easy without consulting the reports to tell what cases are based upon the common law and what upon statute. "Chitty's Pleading, which [as John G. Saxe, in describing his library once said], draws the student's tear," is a work of monumental learning. We remember well when a student listening to lectures by the Hon. Thomas M. Cooley of revered memory, hearing him advise his listeners to study the precedents in the 2d and 3d vols. of Chitty. The man who knows all of Blackstone's Commentaries, Chitty on Pleading, and is well versed in evidence, is better qualified to practice law than are 99% of the bar. *An old edition of Chitty is preferable.*

When we come to enumerate books on practice which should be constantly referred to and which will be found necessary in order to *understand* extraordinary process such as *mandamus, prohibition, quo warranto, scire facias, certiorari,* etc., we find also a wealth of literature. Tidd's and Chitty's General Practice; Wentworth's Pleading (10 vols.); Graham and Burrill's Practice; the last two under the old New York common law system, are very valuable. Of course, local works should be consulted and studied, but our experience is that some of them are most noted for what they do *not* contain. When we reach the subject of equity pleading and practice we shall take occasion to notice some of the older works on those subjects.

The literature on code pleading, considering its alleged simplicity, is rather formidable. See Bender's Law Catalogue (1914), pp. 16, 82. For the student desiring a good outline of the subject, Bryant's Code Pleading (2d Ed.), 1899, is well adapted.

voce, in court, and then minuted down by the chief clerks or prothonotaries. [293] [**Pleading is the statement in a logical and legal form of the facts which constitute the plaintiff's cause of action or the defendant's ground of defence**; it is the formal mode of alleging on the record that which would be the support or the defence of the party in evidence.][2]

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2. Per Buller, J., 3 T. R. 159; Dougl. 278. "It is (as also observed by the same learned judge, in Dougl. Rep. 159), one of the first principles of pleading, that there is only occasion to state *facts*, which must be done for the purpose of informing the court, whose duty it is to declare the *law* arising upon those facts, and of apprizing the opposite party of what is meant to be proved, in order to give him an opportunity to answer or traverse it." And see the observations of Lord C. J. De Grey, Cowp. 682. From this it will be seen, that the science of special pleading may be considered under two heads: 1st. The facts necessary to be stated. 2d. The mode of stating them. In these considerations, the reader must be contented with a general outline of the law upon the subject.

1st. *The Facts Necessary to Be Stated.*— No more should be stated than is essential to constitute the cause of complaint, or the ground of defence. Cowp. 683; 1 Lord Ray. 171. And facts only should be stated, and not arguments or inferences, or matter of law. Cowp. 684; 5 East, 275. The party can only succeed on the facts, as they are alleged and proved.

There are various facts which need not be stated, though it may be essential that they should be established in evidence, to entitle the party pleading to succeed.

Thus there are facts of which the court will, from the nature of its *office*, take notice without their being stated; as when the king came to the throne (2 Lord Raym. 794), his privileges (id. 980), proclamations, etc. (1 Lord Raym. 282; 2 Camp. 44; 4 M. & S. 532), but private orders of council, pardons and declarations of war, etc., must be stated. 2 Litt. Bac. Reg. 303; 3 M. & S. 67; 11 Ves. 292; 3 Camp. 61, 67. The time and place of holding parliaments, and their course of proceedings, need not be stated (1 Lord Raym. 343, 210; 1 Saund. 131); but their journals must. Lord Ray. 15; Cowp. 17. *Public* statutes, and the facts they ascertain (1 T. R. 145; Com. Dig. Pleader, c. 76); the ecclesiastical, civil and marine laws (Bro. Quare Impedit, pl. 12; Lord Ray. 338) need not be stated; but *private* acts (Lord Ray. 381; 2 Dougl. 97) and foreign (2 Cart. 273; Cowp. 174) and plantation and forest (2 Leon. 209) laws, must. Common law rights, duties and *general* customs, customs of gavelkind and borough English (Dougl. 150; Lord Ray. 175, 1542; Carth. 83; Co. Litt. 175; Lord Raym. 1025; Cro. Car. 561), need not be stated; but particular local customs must. 1 Rol. Rep. 509; 9 East, 185; Stra. 187, 1187; Dougl. 387. The almanack is part of the law of the land, and the courts take notice thereof, and the days of the week, and of the moveable feasts and terms. Dougl. 380; Salk.

The first of these is the **declaration**, *narratio*, or *count*, anciently called the *tale*, in which the plaintiff sets forth his cause of complaint at length, being indeed only an amplification or exposition of the original writ upon which his action is founded, with the additional circumstances of time and place when and where the injury was committed.

In local actions, where possession of land is to be re-

269; 1 Roll. Ab. 524, c. pl. 4; 6 Mod. 81; Salk. 626. So the division of *England* into *counties* will be noticed without pleading (2 Inst. 557; Marsh. 124) but not so of a less division (id.), nor of Ireland. 1 Chit. Rep. 28, 32; 3 B. & A. 301; S. C., 2 D. & R. 15; 1 B. & C. 16, S. C. The court will take judicial notice of the incorporated towns, of the extent of ports, and the river Thames. Stra. 469; 1 H. Bla. 356. So it will take notice of the meaning of English words and terms of art, according to their ordinary acceptation (1 Rol. Ab. 86, 525); also of the names and quantities of legal weights and measures (1 Rol. Ab. 525); also courts will take notice of its own course of proceedings (1 T. R. 118; 2 Lev. 176) and of those of the superior courts (2 Co. Rep. 18; Cro. Jac. 67), the privileges they confer on their officers (Lord Ray. 869, 898), of courts of general jurisdiction, and the course of proceedings therein; as the court of exchequer in Wales, and the counties palatine (1 Lord Raym. 154; 1 Saund. 73); but the courts are not bound, ex officio, to take notice who were, or are the judges of another court at Westminster (2 Andr. 74; Stra. 1226), nor are the superior courts, ex officio, bound to notice the customs, laws or proceedings of inferior courts of limited jurisdiction (1 Roll. Rep. 105; Lord Raym. 1334; Cro. Eliz. 502), unless indeed in courts of error. Cro. Car. 179.

Where the law presumes a fact, as that a person is innocent of a fraud or crime, or that a transaction is illegal, it need not be stated. 4 M. & S. 105; 2 Wils. 147; Co. Lit. 78b; 1 B. & A. 463.

Matter which should come more properly from the other side, as it is presumed to lie more in the knowledge of the other party, or is an answer to the charge of the party pleading, need not be stated, unless in pleas of estoppel and alien enemy; but this rule must be acted upon with caution; for if the fact in any way constitutes a condition precedent, to enable the party to avail himself of the charge stated in his pleading, such fact should be stated. Com. Dig. Pleader, c. 81; 1 Leon. 18; 2 Saund. 62b; 4 Camp. 20; 11 East, 638, and see cases 1 Chit. on Pl. 206; Stephen, 354.

Though the facts of a case must be stated in pleading, it is not necessary to state that which is a mere matter of evidence of such fact. 9 Rep. 9b; 9 Edw. III. 5b, 6a; Willes, 130; Raym. 8.

And though the general rule is, that facts only are to be stated, yet there are some instances in which the statement in the pleading is proper, though it does not accord with the real facts, the law allowing a fiction, as in ejectment, trover, detinue, etc. 2 Burr. 667; 1 N. R. 140.

No fact that is not essential to substantiate the pleading should be stated. The statement of immaterial

covered or damages for an actual trespass, or for waste, &c., affecting land, the plaintiff must lay his declaration or declare his injury to have happened in the very county and place that it really did happen in; **but in transitory actions,** for injuries that might have happened anywhere, as debt, detinue, slander, and the like, the plaintiff may declare in

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or irrelevant matter is not only censurable on the ground of expense, but frequently affords an advantage to the opposite party, either as the ground of a variance, or as rendering it encumbent on the party pleading to adduce more evidence than would otherwise have been necessary; though, indeed, if the matter unnecessarily stated be wholly foreign and impertinent to the cause, so that no allegation whatever on the subject was necessary, it will be rejected as surplusage, it being a maxim that *utile per inutile non vitiatur*. See cases, etc., in Chit. on Pl. 208, 9, 10. Besides this, the pleading must not state two or more facts, either of which would of itself, independently of the other, constitute a sufficient ground of action or defence. Co. Lit. 304a; Com. Dig. Pleader, C. 33, E. 2; 1 Chit. on Pl. 208.

2dly. *The Mode of Stating Facts.*—The facts should be stated logically, in their natural order; as, on the part of the plaintiff, his right, the injury and consequent damage; and these, with certainty, precision, and brevity. The facts, as stated, must not be insensible or repugnant, nor ambiguous or doubtful in meaning, nor argumentative, nor in the alternative, nor by way of recital, but positive, and according to their legal effect and operation. Dougl. 666, 7; 1 Chit. on Pl. 211; Stephen, 378 to 405.

Certainty signifies a clear and distinct statement, so that it may be understood by the opposite party, by the jury, who are to ascertain the truth of such statement, and by the court, who are to give judgment. Cowp. 682; Com. Dig. Pleader, C. 17. Less certainty is requisite, when the law presumes that the knowledge of the facts is peculiarly in the opposite party; and so when it is to be presumed that the party pleading is not acquainted with minute circumstances. 13 East, 112; Com. Dig. Pleader, C. 26; 8 East, 85. General statements of facts admitting of almost any proof, are objectionable (1 M. & S. 441; 3 M. & S. 114); but where a subject comprehends multiplicity of matter, there, in order to avoid prolixity, general pleading is allowed. 2 Saund. 411, n. 4; 8 T. R. 462.

In the *construction* of facts stated in pleading, it is a general rule, that every thing shall be taken most strongly against the party pleading (1 Saund. 259, n. 8); or rather, if the meaning of the words be equivocal, they shall be construed most strongly against the party pleading them (2 H. Bla. 530); for it is to be intended, that every person states his case as favourably to himself as possible (Co. Litt. 30, 36); but the language is to have a reasonable intendment and construction (Com. Dig. Pleader, C. 25); and if the sense be clear, mere exceptions ought not to be regarded (5 East, 529); and where an expression is *capable* of different

what county he pleases,[3] and then the trial must be had in that county in which the declaration is laid. [294]

Though if the defendant will make affidavit that the cause of action, if any, arose not in that but in another county, the court will direct a change of the *venue* or *visne* (that is, the *vicinia* or neighborhood in which the injury is declared to be done), and will oblige the plaintiff to declare in the other county, unless he will undertake to give material evidence in the first.[4]

It is generally usual in actions upon the case to set forth several cases by **different counts in the same declaration**, so that if the plaintiff fails in the proof of one, he may succeed in another.[5] [295] As in an action on the case upon

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meanings, that shall be taken which will support the averment, and not the other which would defeat it. 4 Taunt. 492; 5 East, 257. After verdict, an expression should be construed in such sense as would sustain the verdict. 1 B. & C. 297.

3. This distinction of actions as local and transitory is still important. The actions of ejectment, trespass *quare clausum fregit*, etc., are local, as stated in the text. See the leading case of Mostyn v. Fabrigas, Cowp. 161; 1 Smith's Lead. Cas. *765 and notes.

4. Change of venue in this country is regulated by statute. See local works on Practice.

5. The variations should be substantial; for if the different counts be so similar that the same evidence would support each of them, and be of any considerable length, and vexatiously inserted, the court would, on application, refer it to the master for examination, and to strike out the redundant counts; and in gross cases direct the costs to be paid by the attorney. 1 N. R. 289; Rep. T. Hardw. 129. And as to striking out superfluous counts, see Tidd (8th Ed.), 667, 648; in 2 Bing. 412, nine counts were allowed in an action for slander, though the words used were very few. See 1 Chit. on Pl. 350, 1, 2, as to the insertion of several counts. There must be no misjoinder of different counts; and, in order to prevent the confusion which might ensue, if different forms of action, requiring different pleas and different judgments, were allowed to be found in one action, it is a general rule, that actions in form *ex contractu* cannot be joined with those in form *ex delicto*. Thus, assumpsit and debt (2 Smith, 618, 3 ib. 114), or assumpsit and an action on the case, as for a tort, cannot be joined (1 T. R. 276, 277; 1 Vent. 366; Carth. 189), nor assumpsit with trover (2 Lev. 101; 3 Lev. 99; 1 Salk. 10; 3 Wils. 354; 6 East. 335; 2 Chitty R. 343), nor trover with detinue. Willes, 118; 1 Chitty on Plead. 182. Debt and detinue may, however, be joined, although the judgments be different. 2 Saund. 117. And see further as to what is a misjoinder, 1 Chit. on Pl. 199. Unless the subsequent count expressly refers to the preceding, no defect therein will be aided by such preceding count. Bac.

an *assumpsit* for goods sold and delivered, the plaintiff usually counts or declares, first, upon a settled and agreed price between him and the defendant, as that they bargained for twenty pounds; and lest he should fail in the proof of this, he counts likewise upon a *quantum valebant*, that the defendant bought other goods, and agreed to pay him so much as they were reasonably worth, and then avers that they were worth other twenty pounds; and so on in three or four different shapes; and at last concludes with declaring that the defendant had refused to fulfil any of these agreements, whereby he is endamaged to such a value. And if he proves the case laid in any one of his counts, though he fails in the rest, he shall recover proportionable damages.[6] This declaration always concludes with these words, "**and thereupon he brings suit,**" &c., "*inde producit sectam,*" &c.

By which words, *suit* or *secta* (*a sequendo*), were anciently understood the witnesses or followers of the plaintiff. For in former times the law would not put the defendant to the trouble of answering the charge till the plaintiff had made out at least a probable case. But the actual production of the *suit*, the *secta*, or *followers*, is not antiquated, and hath been totally disused, at least ever since the reign of Edward III., though the form of it still continues.

At the end of the declaration are added also **the plaintiff's common pledges of prosecution** [obsolete], John Doe and Richard Roe, which are now mere names of form; though formerly they were of use to answer to the king for the amercement of the plaintiff in case he were nonsuited, barred of his action, or had a verdict or judgment against him.

For if the plaintiff neglects to deliver a declaration for two terms after the defendant appears, or is guilty of other delays or defaults against the rules of law in any subsequent stage of action, he is adjudged *not to follow* or pursue his remedy as he ought to do, and thereupon **a nonsuit, or non**

Ab. Pleas and Pleader, 16, 1. In Illinois counts in case and trover and in trover and replevin may be joined in the same declaration. 1 Puterburgh Com. Law, Plead. & Prac. (7th Ed.), 292.

6. See common counts considered *ante*. They are in every-day use, as stated by the author, only in an abbreviated form, in those states retaining the common law forms of pleading; and are very useful in preventing a variance between the pleadings and the evidence.

prosequitur is entered, and he is said to be *nonpros'd.*[7] [296] And for thus deserting his complaint, after making a false claim or complaint (*pro falso clamore suo*), he shall not only pay costs to the defendant, but is liable to be amerced to the king. **A retraxit** differs from a nonsuit in that the one is negative and the other positive. The nonsuit is a mere default and neglect of the plaintiff, and therefore he is allowed to begin his suit again upon payment of costs; but a *retraxit* is an open and voluntary renunciation of his suit in court, and by this he forever loses his action.[8] **A discontinuance** is somewhat similar to a nonsuit, for when a plaintiff leaves a chasm in the proceedings of his cause, as by not continuing the process regularly from day to day and time to time, as he ought to do, the suit is discontinued, and the defendant is no longer bound to attend, but the plaintiff must begin again by suing out a new original, usually paying costs to his antagonist.

When the plaintiff hath stated his case in the declaration, it is incumbent on the defendant within a reasonable time[1] **to make his defence** and to put in a *plea,* else the plaintiff will at once recover judgment by *default,* or *nihil dicit,* of the defendant.

Defence, in its true legal sense, signifies not a justification, protection, or guard, which is now its popular signification, but merely an *opposing* or *denial* (from the French verb *defender*) of the truth or validity of the complaint. It is the *contestatio litis* of the civilians; a general assertion that the plaintiff hath no ground of action, which assertion is afterwards extended and maintained in his plea. [297] By defending the force and injury, the defendant waived all pleas of misnomer; by defending the damages, all exceptions to the person of the plaintiff; and by defending either one or the other *when and where* it should behoove him, he acknowledged the jurisdiction of the court. [298] But of late years these niceties have been very deservedly discountenanced, though they still seem to be law if insisted on.[2]

Before defence made, if at all, **cognizance** of the suit must be *claimed*

7. See local works on Practice.

8. This distinction still exists in this country.

1. Fixed by rule or statute.

2. At present they are mere matters of form.

or demanded, when any person or body corporate hath the franchise, not only of *holding pleas* within a particular limited jurisdiction, but also of the *cognizance of pleas*. Upon this claim of cognizance, if allowed, all proceedings shall cease in the superior court, and the plaintiff is left at liberty to pursue his remedy in the special jurisdiction.[3]

After defence made, the defendant must put in his plea. [299] But before he defends, if the suit is commenced by *capias* or *latitat*, without any special *original*, he is entitled to demand one **imparlance**, or *licentia loquendi;* and may before he pleads, have more time granted by consent of the court, to see if he can end the matter amicably without farther suit, by talking with the plaintiff.[4] **There are also many other previous steps** which may be taken by a defendant before he puts in his plea. He may, in real actions, demand a **view**[5] of the thing in question, in order to ascertain its identity and other circumstances. He may crave **oyer** of the writ, or of the bond, or other specialty upon which the action was brought, that is, to *hear* it read to him, the generality of defendants in the times of ancient simplicity being supposed incapable to read it themselves; whereupon the whole is entered *verbatim* upon the record, and the defendant may take advantage of any condition or other part of it not stated in the plaintiff's declaration.[6]

3. Not applicable to this country.

4. Further time to plead is now usually obtained by special motion.

5. Now allowed in other actions if necessary in the interests of justice on special motion. Real actions have been abolished.

6. But now a defendant is not allowed *oyer* of the writ. 1 B. & P. 646; 3 B. & P. 395; 7 East, 383. As to the demand and giving of oyer, and the manner of setting out deeds, etc., therein, see 1 Saund. 9 (1), 289 (2); 2 Saund. 9 (12, 13), 46 (7), 366 (1), 405 (1), 410 (2); Tidd (8th Ed.), 635 to 638, and index, tit. Oyer; 1 Chit. on Pl. 369 to 375; Gould's Plead., ch. 8, secs. 32-64.

In Illinois profert is unnecessary; but oyer may be had of *any instrument in writing whether under seal or not* if the same is not lost or destroyed, in the same manner as if profert had been properly made according to the common law. Rev. Stat. Ill., ch. 110, sec. 20: Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 491. Profert and oyer are also still in use in Michigan and probably in other states. See Green's New Practice, *1255, *1276, *1328, *1333. This practice does not apply in chancery. Hamilton v. Downer, 152 Ill. 651.

When these proceedings are over, the defendant must then put in his excuse or plea. [301] Pleas are of two sorts, *dilatory* pleas, and pleas *to the action.* **Dilatory pleas** are such as tend merely to delay or put off the suit, by questioning the propriety of the remedy rather than by denying the injury; **pleas to the action** are such as dispute the very cause of suit. The former cannot be pleaded after a general imparlance, which is an acknowledgment of the propriety of the action. For **imparlances** are either **general,** of which we have before spoken and which are granted of course, or **special,** with a saving of all exceptions to the writ or count, which may be granted by the prothonotary; or they may be still **more special,** with a saving of all exceptions whatsoever, which are granted at the discretion of the court.

1. **Dilatory pleas are:** 1. **To the jurisdiction** of the court, alleging that it ought not to hold plea of this injury. 2. **To the disability of the plaintiff,** by reason whereof he is incapable to commence or continue the suit; as that he is an alien enemy, outlawed, excommunicated, attainted of treason or felony, under a *praemunire,* not *in rerum natura* (being only a fictitious person), an infant, a feme-covert, or a monk professed. 3. **In abatement,** which abatement is either of the writ or the count, for some defect in one of them, as by misnaming the defendant, which is called a **misnomer,** giving him a wrong addition, as *esquire* instead of *knight,* or other want of form in any material respect. [302] Or it may be that the plaintiff is dead; for the death of either party is at once an abatement of the suit.[7] **And in actions merely personal arising ex delicto** for wrongs actualy done or committed by the defendant, as trespass, battery, and slander, the rule is that **actio personalis moritur cum persona,** and it never shall be revived either by or against the executors or other representatives.[8] For neither the execu-

7. See, generally, as to dilatory pleas, Stephens' Pleading, secs. 223, 224; Gould's Plead., ch. 2, secs. 32-36; id., ch. 5. Some of these disabilities are obsolete and have already been considered.

8. This rule has been changed, to some extent, by statute in many states so that actions of tort affecting property rights will survive. Actions for torts to the person, such as assault and battery, slander, false imprisonment, etc., are still subject to the common law rule stated in the text. This subject has been already considered *ante.*

tors of the plaintiff have received, nor those of the defendant have committed, in their own personal capacity, any manner of wrong or injury. **But in actions arising ex contractu**, by breach of promise and the like,[9] where the right descends to the representatives of the plaintiff, and those of the defendant have assets to answer the demand, though the suit shall abate by the death of the parties, yet they may be **revived** against or by the executors, being indeed rather actions against the property than the person, in which the executors have now the same interest that their testator had before.

Now by statute 4 and 5 Anne, c. 16, no dilatory plea is to be admitted without affidavit made of the truth thereof, or some probable matter shown to the court to induce them to believe it true. And with respect to the pleas themselves, it is a rule that **no exception shall be admitted against a declaration or writ, unless the defendant will in the same plea give the plaintiff a better**, that is, show him how it might be amended, that there may not be two objections upon the same account.[1]

All pleas to the jurisdiction conclude to the cognizance of the court, praying "judgment, whether the court will have further cognizance of the suit;" **pleas to the disability** conclude to the person, by praying "judgment, if the said A the plaintiff ought to be answered," and **pleas in abatement** (when the suit is by original) conclude to the writ or declaration, by praying "judgment of the writ or declaration and that the same may be quashed," *cassetur*, made void or abated. [303]

When these dilatory pleas are allowed, the cause is either dismissed from that jurisdiction, or the plaintiff is stayed till his disability be removed, or he is obliged to sue out a new writ, by leave obtained from the court, or to amend and new-frame his declaration. But when, on the other hand, they are overruled as frivolous, the defendant has

9. But not for breach of promise of marriage. Wade v. Kalbfleisch, 58 N. Y. 283.

1. Andrews Stephens' Plead., sec. 223.

judgment of *respondeat ouster,* or to *answer over* in some better manner.[2] It is then incumbent on him to plead.

2. **A plea to the action,** that is, to answer to the merits of the complaint. This is done by confessing or denying it.

A confession of the whole complaint is not very usual, for then the defendant would probably end the matter sooner, or not plead at all, but suffer judgment to go by default. Yet sometimes, after **tender and refusal** of a debt, if the creditor harasses his debtor with an action, it then becomes necessary for the defendant to acknowledge the debt and plead the tender, adding that he has always been ready, *tout temps prist,* and still is ready, *uncore prist,* to discharge it;[3] for a tender by the debtor and refusal by the creditor will in all cases discharge the costs, but not the debt itself, though in some particular cases the creditor will totally lose his money. **But frequently the defendant confesses one part of the complaint** (by a *cognovit actionem* in respect thereof), **and traverses or denies the rest,** in order to avoid the expense of carrying that part to a formal trial which he has no ground to litigate. [304] A species of this sort of confession is the **payment of money into court,** which is for the most part necessary upon pleading a tender, and is itself a kind of tender to the plaintiff, by paying into the hands of the proper officer of the court as much as the defendant acknowledges to be due, together with the costs hitherto incurred, in order to prevent the expense of any further proceedings. This may be done upon what is called **a motion,** which is an occasional application to the court by the parties or their counsel, in order to obtain some rule or order of court, which becomes necessary in the progress of a cause, and it is usually grounded upon an **affidavit** (the perfect tense of the verb *affido*), being a voluntary oath before some judge or officer of the court, to evince the truth of certain facts upon which the motion is grounded; though no such *affidavit* is necessary for payment of money into

2. Andrews Stephens' Plead., sec. 97.

3. The tender must be kept good and the money ready to be delivered within a reasonable time after acceptance. See, generally, Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 211.

court. **If after the money paid in the plaintiff proceeds in his suit,** it is at his own peril, for if he does not prove more due than is so paid into court, he shall be non-suited and pay the defendant costs; but he shall still have the money so paid in, for that the defendant has acknowledged to be his due. To this head may also be referred the practice [authorized by statute] of what is called a **set-off,**[4] whereby the defendant acknowledges the justice of the plaintiff's demand on the one hand, but on the other sets up the demand of his own to counterbalance that of the plaintiff, either in the whole or in part: as, if the plaintiff sues for ten pounds due on a note of hand, the defendant may set off nine pounds due to himself for merchandise sold to the plaintiff, and in case he *pleads* such set-off, must pay the remaining balance into court.

Pleas that totally deny the cause of complaint are either the *general* issue or a *special* plea in bar. [305]

1. **The general issue,** or general plea, is what traverses, thwarts, and denies at once the whole declaration, without offering any special matter whereby to evade it. As in trespass, either *vi et armis* or on the case, *non culpabilis,* not guilty; in debt upon contract, *nihil debet,* he owes nothing; in debt on bond, *non est factum,* it is not his deed; on an *assumpsit, non assumpsit,* he made no such promise. It is an invariable rule that every defence which cannot be specially pleaded may be given in evidence upon the general issue at the trial.[5]

2. **Special pleas,** *in bar* of the plaintiff's demand, are very various, according to the circumstances of the defendant's case. [306] As in personal actions, an accord, arbitration,

4. Regulated by statute in all the states, so that a judgment over may be recovered by the defendant against the plaintiff when the set-off exceeds the plaintiff's demand.

Recoupement is also a defence. This is where the defendant claims damages against the plaintiff, for the breach of the same contract that is sued on. See local statutes; Puterburgh's Com. Law, Pl. & Pr. (7th Ed.), 151; 1 Green's New Prac., *226, *229.

5. This plea is in general use in Illinois, Michigan and probably other states. Its form has, however, in Michigan, been changed by statute, though its legal effect is the same. 2 Green's New Prac. *1509.

conditions performed, nonage of the defendant, or some other fact which precludes the plaintiff from his action. **A justification** is likewise a special plea in bar, as in actions of assault and battery, *son assault demesne*, that it was the plaintiff's own original assault; in trespass, that the defendant did the thing complained of in right of some office which warranted him so to do; or, in an action of slander, that the plaintiff is really as bad a man as the defendant said he was.

Also, a man may plead **the statutes of limitation** in bar, or the time limited by certain acts of parliament, beyond which no plaintiff can lay his cause of action.[6]

An estoppel is likewise a special plea in bar, which happens where a man hath done some act or executed some deed which estops or precludes him from averring anything to the contrary. [308]

The conditions and qualities of a plea (which, as well as the doctrine of estoppels, will also hold equally [*mutatis mutandis*][7] with regard to other parts of pleading) are: 1. That it be **single** and containing only one matter [i. e., in each place], for **duplicity** begets confusion.[8] But by statute 4 & 5 Anne, c. 16, a man with leave of the court may plead two or more distinct matters or single pleas, as in an action of assault and battery, these three, not guilty, *son assault demesne*, and the statute of limitations. 2. **That it be direct and positive**, and not argumentative. 3. That it have convenient **certainty of time, place, and persons.** 4. **That it answer the plaintiff's allegations** in every material point. 5. **That it be so pleaded as to be capable of trial.**

Special pleas are usually in the affirmative, sometimes in the negative; but they always advance some new fact not mentioned in the declaration, and then they must be averred to be true in the common form, "**and this he is ready to verify.**"[9] [309] This is not necessary in pleas of the general issue, those always containing a total denial of the facts before advanced by the other party, and therefore putting him upon the proof of them.

6. Consult the local statutes as the statutes are not uniform in the different states.

7. The terms being changed.

8. Leave of court is no longer necessary.

9. Mere matter of form but still used.

No man is allowed to plead specially such a plea as amounts only to the general issue, or a total denial of the charge; but in such case he shall be driven to plead the general issue in terms, whereby the whole question is referred to a jury. But if the defendant, in an assise or action of trespass, be desirous to refer the validity of his title to the court rather than the jury, he may state his title specially, and at the same time **give color** to the plaintiff, or suppose him to have an appearance or color of title, bad indeed in point of law, but of which the jury are not competent judges.[1]

As if his own true title be that he claims by feoffment with livery from A, by force of which he entered on the lands in question, he cannot plead this by itself, as it amounts to no more than the general issue (*nul tort, nul disseisin*) in assise, or *not guilty* in an action of trespass. But he may allege this specially, provided he goes farther and says that the plaintiff claiming by *color* of a prior deed of feoffment without livery entered, upon whom he entered, and may then refer himself to the judgment of the court which of these two titles is the best in point of law.

When the plea of the defendant is thus put in, if it does not amount to an issue or total contradiction of the declaration, but only evades it, the plaintiff may plead again, and **reply** to the defendant's plea **either traversing** it, — that is, totally denying it,— or he may **allege new matter in contradiction** to the defendant's plea, as when the defendant pleads *no award made* the plaintiff may reply and set forth an actual award and assign a breach; or the replication may **confess and avoid** the plea, by some new matter or distinction consistent with the plaintiff's former declaration, as in an action for trespassing upon land whereof the plaintiff is seised, if the defendant shows a title to the land by descent, and that therefore he had a right to enter, and gives color to the plaintiff, the plaintiff may either traverse and totally deny the fact of the descent, or he may confess and avoid it by replying that true it is that such descent happened, but that since the descent the defendant himself

1. See Gould's Plead., ch. 6, part 2, secs. 81-84; Stephens' Plead., ch. 5, sec. 13.

demised the lands to the plaintiff for term of life. [310] To the replication the defendant may *rejoin,* or put in an answer called a **rejoinder.** The plaintiff may answer the rejoinder by a **sur-rejoinder,** upon which the defendant may **rebut,** and the plaintiff answer him by a **sur-rebutter.**[2]

In the several stages of the pleading it must be carefully observed **not to depart or vary from the title or defence** which the party has once insisted on, for this (which is called a **departure** in pleading) might occasion endless altercation. Therefore the replication must support the declaration, and the rejoinder must support the plea, without departing out of it. As in the case of pleading no award made in consequence of a bond of arbitration, to which the plaintiff replies, setting forth an actual award: now the defendant cannot rejoin that he hath performed this award, for such rejoinder would be an entire departure from his original plea, which alleged that no such award was made, therefore he has now no other choice but to traverse the fact of the replication, or else to demur upon the law of it. [311]

Yet in many actions the plaintiff, who has alleged in his declaration a general wrong, may in his replication, after an evasive plea by the defendant, reduce that general wrong to a more particular certainty by assigning the injury afresh with all its specific circumstances in such manner as clearly to ascertain and identify it, consistently with his general complaint, which is called a **new** or **novel assignment.** As if the plaintiff in trespass declares on a breach of his close in D, and the defendant pleads that the place where the injury is said to have happened is a certain close of pasture in D, which descended to him from B, his father, and so is his own freehold, the plaintiff may reply and assign another close in D, specifying the abuttals and boundaries as the real place of the injury.[3]

Duplicity in pleading must be avoided. Every plea must be simple, entire, connected, and confined to one single

2. The pleadings will rarely extend so far as the sur-rebutter.

3. See, generally, Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 361.

point: it must never be entangled with a variety of distinct, independent answers to the same matter, which must require as many different replies and introduce a multitude of issues upon one and the same dispute. For this would often embarrass the jury, and sometimes the court itself, and at all events would greatly enhance the expense of the parties.

Yet it frequently is expedient to plead in such a manner as to avoid any implied admission of a fact which cannot with propriety or safety be positively affirmed or denied. And this may be done by what is called a **protestation,** whereby the party interposes an oblique allegation or denial of some fact, protesting (by the gerund *protestando*) that such a matter does or does not exist, and at the same time avoiding a direct affirmation or denial. Sir Edward Coke hath defined a protestation (in the pithy dialect of that age) to be "an exclusion of a conclusion." For the use of it is to save the party from being concluded with respect to some fact or circumstance which cannot be directly affirmed or denied without falling into duplicity of pleading, and which yet, if he did not thus enter his protest, he might be deemed to have tacitly waived or admitted. [312]

In any stage of the pleadings, when either side advances or affirms any new matter, he usually avers it to be true, "and this he is ready to verify." [313] **On the other hand, when either side traverses** or denies the facts pleaded by his antagonist, he usually tenders an issue, as it is called, the language of which is different according to the party by whom the issue is tendered; for if the traverse or denial comes from the defendant, the issue is tendered in this manner, "and of this he puts himself upon the country," thereby submitting himself to the judgment of his peers. But if the traverse lies upon the plaintiff he tenders the issue, or prays the judgment of the peers against the defendant in another form, thus: "and this he prays may be inquired of by the country."[4]

But if either side (as, for instance, the defendant) pleads a special negative plea, not traversing or denying anything that was before alleged, but disclosing some new negative matter, as where the suit is on a bond conditioned to per-

4. These forms are still observed.

form an award, and the defendant pleads, negatively, that no award was made, he tenders no issue upon this plea, because it does not appear whether the fact will be disputed, the plaintiff not having yet asserted the existence of any award; but when the plaintiff replies and sets forth an actual specific award, if then the defendant traverses the replication and denies the making of any such award, he then, and not before, tenders an issue to the plaintiff. For **when in the course of pleading they come to a point which is affirmed on one side and denied on the other, they are then said to be at issue,** all their debates being at last contracted into a single point, which must now be determined either in favor of the plaintiff or of the defendant.

CHAPTER XXI.

OF ISSUE AND DEMURRER.

Issue (*exitus*), being the end of all the pleadings, is the fourth part or stage of an action, and is either upon matter of *law* or matter of *fact*. [314]

An issue upon matter of law is called a demurrer, and it confesses the facts to be true as stated by the opposite party, but denies that by the law arising upon those facts any injury is done to the plaintiff, or that the defendant has made out a legitimate excuse; according to the party which first demurs (*demoratur*), rests, or abides upon the point in question. As if the matter of the plaintiff's complaint or declaration be insufficient in law, as by not assigning any sufficient trespass, then the defendant demurs to the declaration; if, on the other hand, the defendant's excuse or plea be invalid, as if he pleads that he committed a trespass by authority from a stranger without making out the stranger's right, here the plaintiff may demur in law to the plea; and so on in every other part of the proceedings where either side perceives any material objection in point of law upon which he may rest his case.

The form of such demurrer is by averring the declaration or plea, the replication or rejoinder, to be insufficient in law to maintain the action or the defence, and therefore praying judgment for want of sufficient matter alleged. [315] Sometimes demurrers are merely for want of sufficient *form* in the writ or declaration. But in cases of exceptions to the form or manner of pleading, the party demurring must, by statute 27 Eliz. c. 5, and 4 & 5 Anne, c. 16, set forth the causes of his demurrer, or wherein he apprehends the deficiency to consist. And upon either a **general** or such a **special demurrer** the opposite party must aver it to be sufficient, which is called a **joinder in demurrer,**[1] and then the parties are at issue in point of law; which issue in law, or

1. The practice is still the same where not changed by statute.

demurrer, the judges of the court before which the action is brought must determine.

An issue of fact is where the fact only, and not the law, is disputed. And when he that denies or traverses the fact pleaded by his antagonist has tendered the issue, — thus: "and this he prays may be inquired of by the country;" or "and of this he puts himself upon the country," — it may immediately be subjoined by the other party, "and the said A B doth the like **[similiter]**," which done, the issue is said to be joined, both parties having agreed to rest the fate of the cause upon the truth of the fact in question. **And this issue of fact must, generally speaking, be determined, not by the judges of the court,** but by some other method, the principal of which methods is that by the country, *per pais* (in Latin *per patriam*), that is, **by jury.**[2]

But here it will be proper to observe that during the whole of these proceedings, from the time of the defendant's appearance in obedience to the king's writ, **it is necessary that both the parties be kept or continued in court from day to day** till the final determination of the suit. [316] For the court can determine nothing unless in the presence of both the parties, in person or by their attorneys, or upon default of one of them, after his original appearance and a time prefixed for his appearane in court again. Therefore in the course of pleading, if either party neglects to put in his declaration, plea, replication, rejoinder, and the like, within the times allotted by the standing rules of the court, the plaintiff, if the omission be his, is said to be **nonsuit,** or not to follow and pursue his complaint, and shall lose the benefit of his writ; or, if the negligence be on the side of the defendant, judgment may be had against him for such his **default.** And after issue or demurrer joined, as well as in some of the previous stages of proceeding, a day is continually given and entered upon the record for the parties to appear on from time to time, as the exigence of the case may require. The giving of this day is called the **continuance,** because thereby the proceedings are continued without interruption from one adjournment to another. **If these continuances are omitted,** the cause is thereby discontinued, and the defendant is discharged *sine die*, without a day, for this turn; for by his appearance in court he has obeyed the command of the king's writ, and unless he be adjourned over to a certain day he is no longer bound to

2. It is a maxim that the court responds to questions of law and the jury to questions of fact. By statute in some states all the issues, both fact and law, may be tried by the court by consent of the parties. In Manitoba, Canada, this is the regular practice, trial by jury being rather unusual.

attend upon that summons, but he must be warned afresh, and the whole must begin *de novo*. [Not so now in courts of record.]

Now it may sometimes happen that after the defendant has pleaded, nay, even after issue or demurrer joined, **there may have arisen some new matter** which it is proper for the defendant to plead, as that the plaintiff, being a feme-sole, is since married, or that she has given the defendant a release, and the like; here, if the defendant takes advantage of this new matter as early as he possibly can, viz., at the day given for his next appearance, he is permitted to plead it in what is called a **plea of puis darrein continuance**,[3] or since the last adjournment. For it would be unjust to exclude him from the benefit of this new defence, which it was not in his power to make when he pleaded the former. [317] But it is dangerous to rely on such a plea without due consideration, for it confesses the matter which was before in dispute between the parties. And it is not allowed to be put in if any continuance has intervened between the arising of this fresh matter and the pleading of it; for then the defendant is guilty of neglect, or **laches**, and is supposed to rely on the merits of his former plea. Also it is not allowed after a demurrer is determined, or verdict given, because the relief may be had in another way, namely, by writ of *audita querela*, of which hereafter. And these pleas *puis darrein continuance*, when brought to a demurrer in law or issue of fact, shall be determined in like manner as other pleas.

Demurrers, or questions concerning the sufficiency of the matters alleged in the pleadings, are to be determined by the judges of the court upon solemn argument by counsel on both sides, and to that end a demurrer-book is made up, containing all the proceedings at length, which are afterwards entered on *record*, and copies thereof, called *paper-books*, are delivered to the judges to peruse. **The record** is a history of the most material proceedings in the cause

3. See Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 244. Great certainty is required in a plea of this sort. Id. Ross v. Nesbit, 2 Gilm. 252.

entered on a parchment roll,[4] and continued down to the present time, in which must be stated the original writ and summons, all the pleadings, the declaration, view or *oyer* prayed, the imparlances, plea, replication, rejoinder, continuances, and whatever further proceedings have been had, all entered *verbatim* on the roll, and also the issue or demurrer, and joinder therein.

These were formerly all written, as indeed all public proceedings were, in **Norman or law French,** and even the arguments of the counsel and decisions of the court were in the same barbarous dialect. This continued till the reign of Edward III., when by a statute passed in the thirty-sixth year of his reign [1362], it was enacted that for the future all pleas should be pleaded, shown, defended, answered, debated, and judged in the **English** tongue, but be entered and enrolled in **Latin.** [318] The practisers, however, being used to the Norman language, still continued to take their notes in law French, and of course when those notes came to be published under the denomination of **reports** they were printed in that barbarous dialect.

This technical Latin continued in use from the time of its first introduction till the subversion of our ancient constitution under Cromwell, when, among many other innovations in the law, the language of our records was altered and turned into English. [322] But at the restoration of King Charles this novelty was no longer countenanced, the practisers finding it very difficult to express themselves so concisely or significantly in any other language but the Latin. And thus it continued without any sensible inconvenience till about the year **1730,** when it was again thought proper that the proceedings at law should be done into **English,** and it was accordingly so ordered by statute 4 Geo. II. c. 26.[5]

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4. The common law record now contains the same items; but the original pleadings with their file marks and the entries of verdict, judgment, etc., in the books of records now constitute the record without the enrollment on parchment as described in the text. In short the files (but not all the papers on file) and entries constitute the record. A bill of exceptions may be necessary to get other matters into the record. This will be considered in another place.

5. All proceedings in our courts are in English.

CHAPTER XXII.

OF THE SEVERAL SPECIES OF TRIAL.

Trial is the examination of the matter of fact in issue. [330]

The species of trials in civil cases are seven. By *record;* by *inspection* or *examination;* by *certificate;* by *witnesses;* by *wager of battle;* by *wager of law;* and by *jury.*

1. **First, then, of the trial by record.** This is only used in one particular instance, and that is where a matter of record is pleaded in any action, as a fine, a judgment, or the like, and the opposite party pleads "**nul tiel record,**" that there is no such matter of record existing. Upon this, issue is tendered and joined in the following form, "and this he prays may be inquired of by *the record,* and the other doth the like;" and hereupon the party pleading the record has a day given him to bring it in, and proclamation is made in court for him to "bring forth the record by him in pleading alleged, or else he shall be condemned," and on his failure his antagonist shall have judgment to recover [331] The trial, therefore, of this issue is merely by the record,[1] for, as Sir Edward Coke observes, a record or enrolment is a monument of so high a nature, and importeth in itself such absolute verity, that if it be pleaded that there is no such record, it shall not receive any trial by witness, jury, or otherwise, but only by itself.

II. **Trial by inspection or examination**[2] is when, for the greater expedition of a cause, in some point or issue, being either the principal question or arising collaterally out of it, but being evidently the object of senses, the judges of the court, upon the testimony of their own sense, shall decide the point in dispute. For where the affirmative or negative of a question is matter of such obvious determination, it is not thought necessary to summon a jury to decide it, who are properly called in to inform the conscience of the court in respect of *dubious* facts; and therefore when the fact, from its nature, must be evident to the court either

1. The court determines this issue by an inspection of the transcript of the record. Puterburgh's Com. Law, Plead. & Prac. (7th Ed.), 495, 496.

2. This method of trial probably does not exist in this country.

from ocular demonstration or other irrefragable proof, there the law departs from its usual resort, the verdict of twelve men, and relies on the judgment of the court alone. [332] As in case of a suit to reverse a fine for nonage of the cognizor, or to set aside a statute or recognizance entered into by an infant, here, and in other cases of the like sort, a writ shall issue to the sheriff, commanding him that he constrain the said party to appear, that it may be ascertained by the view of his body by the king's justices whether he be of full age or not. If, however, the court has, upon inspection, any doubt of the age of the party (as may frequently be the case), it may proceed to take proofs of the fact, and particularly may examine the infant himself upon an oath of *voire dire, veritatem dicere*,[3] that is, to make true answer to such questions as the court shall demand of him; or the court may examine his mother, his godfather, or the like.

In like manner, if a defendant pleads in abatement of the suit that the plaintiff is *dead*, and one appears and calls himself the plaintiff, which the defendant denies, in this case the judges shall determine by inspection and examination whether he be the plaintiff or not. Also if a man be found by a jury an idiot *a nativitate*, he may come in person into the Chancery before the chancellor, or be brought there by his friends, to be inspected and examined whether idiot or not; and if upon such view and inquiry it appears he is not so, the verdict of the jury and all the proceedings thereon are utterly void and instantly of no effect.

Also, to ascertain any circumstances relative to a particular day past, it hath been tried by an inspection of the almanac by the court. [333] But in all these cases the judges, if they conceive a doubt, may order it to be tried by jury.

III. **The trial by certificate** is allowed in such cases where the evidence of the person certifying is the only proper criterion of the point in dispute. For when the fact in question lies out of the cognizance of the court the judges must rely on the solemn averment or information of persons in such a station as affords them the most clear and competent knowledge of the truth. As, therefore, such evidence (if given to a jury) must have been conclusive, the law, to save trouble and circuity, permits the fact to be determined upon such certificate merely. Thus, if the issue be whether A was absent with the king in his army out of the realm in time of war, this shall be tried by the certificate of the mareschal of the king's host in writing under his seal, which shall be sent to the justices. For matters within the realm, the customs of the city of London shall be tried by the certificate of the mayor and aldermen certified by the mouth of their recorder, upon a surmise from the party alleging it that the custom ought to be thus tried, else it must be tried by the country. [334] In some cases the sheriff of London's certificate shall be the final trial, as if the issue be whether the defendant be a citizen of London or a foreigner, in case of privilege pleaded to be sued only in the city courts.

3. To speak the truth.

[335] In matters of ecclesiastical jurisdiction, as *marriage*, and of course *general bastardy*, and also *excommunication* and *orders*, these and other like matters shall be tried by the bishop's certificate. The trial of all customs and practice of the courts shall be by certificate from the proper officers of those courts respectively, and what return was made on a writ by the sheriff or under-sheriff shall be only tried by his own certificate.[4] [336]

IV. **A fourth species of trial is that by witnesses,** *per testes*, without the intervention of a jury. This is the only method of trial known to the civil law in which the judge is left to form in his own breast his sentence upon the credit of the witnesses examined. But it is very rarely used in our law, which prefers the trial by jury before it in almost every instance, save only that when a widow brings a writ of dower, and the tenant pleads that the husband is not dead, this, being looked upon as a dilatory plea, is in favor of the widow, and for greater expedition allowed to be tried by witnesses examined before the judges; and so, saith Finch, shall no other case in *our* law. But Sir Edward Coke mentions some others, as to try whether the tenant in a real action was duly summoned or the validity of a challenge to a juror, so that Finch's observation must be confined to the trial of direct, and not collateral issues.[5] And in every case Sir Edward Coke lays it down that the affirmative must be proved by two witnesses at the least.[6]

V. **The next species of trial is of great antiquity, but much disused, though still in force if the parties choose to abide by it; I mean the trial by wager of battle.** [337] [Obsolete.] This trial was introduced into England among other Norman customs by William the Conqueror; but was only used in three cases, one military, one criminal, and the third civil. The first in the court-martial, or Court of Chivalry and Honor; the second in appeals of felony, of which we shall speak in the

4. In this country marriage, bastardy, absence in the army, etc., would be established before a jury as in any other case.

5. By statute in many of the states and in Canada issues of fact may, where no jury is demanded, be tried by the court without a jury.

6. In courts of law, in general, it suffices to prove a fact by one witness. In courts of equity it is sometimes otherwise, and two witnesses are required. The exceptions both at law and in equity will be considered under the head Evidence in vol. 2 of this series.

next book; and the third upon issue joined in a writ of right, the last and most solemn decision of real property. [338]

The last trial by battle that was waged in the Court of Common Pleas at Westminster (though there was afterwards one in the Court of Chivalry in 1631 and another in the County Palatine of Durham in 1638) was in the thirteenth year of Queen Elizabeth, A. D. 1571, as reported by Sir James Dyer. [Dyer, 301. See also Ashford v. Thornton, 1 B. & Ald. 405, in 1818, on an appeal of murder.]

VI. **A sixth species of trial is by wager of law,** *vadiatio legis* [obsolete], as the foregoing is called *wager of battle, vadiatio duelli;* because, as in the former case, the defendant gave a pledge, gage, or *vadium,* to try the cause by battle, so here he was to put in sureties or *vadios,* that at such a day he will make his law, that is, take the benefit which the law has allowed him. [341] For our ancestors considered that there were many cases where an innocent man of good credit might be overborne by a multitude of false witnesses, and therefore established this species of trial by the oath of the defendant himself; for if he will absolutely swear himself not chargeable, and appears to be a person of reputation, he shall go free and forever acquitted of the debt or other cause of action.

The manner of waging and making law is this. He that has waged, or given security, to make his law, brings with him into court eleven of his neighbors. [343] The defendant, then standing at the end of the bar, is admonished by the judges of the nature and danger of a false oath. And if he still persists, he is to repeat this or the like oath: "Hear this, ye justices, that I do not owe unto Richard Jones the sum of ten pounds, nor any penny thereof, in manner and form as the said Richard hath declared against me. So help me God." And thereupon his eleven neighbors, or compurgators, shall avow upon their oaths that they believe in their consciences that he saith the truth, so that himself must be sworn *de fidelitate,*[7] and the eleven *de credulitate.*[8]

With us in England wager of law is never *required,* and is only **admitted** where an action is brought upon such matters as may be supposed to be privately transacted between the parties, and wherein the defendant may be presumed to have made satisfaction without being able to prove it. [345] Therefore it is **only in actions of debt** upon simple contract, or for amercement [in a court not of record], in actions of **detinue** and of **account,** where the debt may have been paid, the goods restored, or the account balanced, without any evidence of either, that the defendant is admitted to wage his law.

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7. Upon his faith.

8. Upon their belief.

CHAPTER XXIII.

OF THE TRIAL BY JURY.

Trials by jury in civil causes are of two kinds, *extraordinary* and *ordinary*. [351]

The first species of extraordinary trial by jury is that of the **Grand Assize** [for the trial of writs of right].

Another species of extraordinary juries is the **jury to try an attaint,** which is a process commenced against a former jury for bringing in a false verdict [both of which are abolished in this country].

With regard to the ordinary trial by jury in civil cases, I shall in considering it follow the order and course of the proceedings themselves, as the most clear and perspicuous way of treating it.

When therefore an issue is joined by these words, "and this the said A prays may be inquired of by the country," or "and of this he puts himself upon the country, and the said B does the like,"— the court awards a **writ of venire facias**[1] upon the roll or record, commanding the sheriff "that he cause to come *here* on such a day, twelve free and lawful men, *liberos et legales homines,* of the body of his county, by whom the truth of the matter may be better known, and who are neither of kin to the aforesaid A nor the aforesaid B, to recognize the truth of the issue between the said parties. [352] And such writ was accordingly issued to the sheriff. By the statute 42 Edw. III. c. 11, it was enacted that no inquests (except of assise and gaol delivery) should be taken by writ of *nisi prius* till after the sheriff had returned the names of the jurors to the court above. [353] So that now the course is to make the sheriff's *venire* returnable on the last return of the same term wherein issue is joined, viz., Hilary or Trinity terms, which from the making up of the issues therein, are usually called *issuable* terms. And he returns the names of the jurors in a **panel**

1. Cause to come. This writ still issues by the same name.

(a little pane, or oblong piece of parchment) annexed to the writ. This jury is not summoned, and therefore, not appearing at the day, must unavoidably make default. [354] For which reason a compulsive process is now awarded against the jurors, called in the Common Pleas a writ of *habeas corpora juratorum*,[2] and in the King's Bench a *distringas*, commanding the sheriff to have their bodies or to distrain them by their lands and goods, that they may appear upon the day appointed. The entry, therefore, on the roll or record is, "that the jury is respited, through defect of the jurors, till the first day of the next term, then to appear at Westminster, unless before that time, viz., on Wednesday, the fourth of March, the justices of our lord the king, appointed to take assises in that county, shall have come to Oxford, that is, to the place assigned for holding the assises." And thereupon the writ commands the sheriff to have their bodies at Westminster on the said first day of next term, or before the said justices of assise, if before that time they come to Oxford, viz., on the fourth of March aforesaid. And as the judges are sure to come and open the circuit commissions on the day mentioned in the writ, the sheriff returns and summons the jury to appear at the assizes, and there the trial is had before the justices of *assise* and *nisi prius*, among whom are usually two of the judges of the courts of Westminster, the whole kingdom being divided into six circuits for this purpose.

If the sheriff be not an indifferent person, as if he be a party in the suit, or be related by either blood or affinity to either of the parties, he is not then trusted to return the jury, but the *venire* shall be directed to the **coroners**, who in this as in many other instances are the substitutes of the sheriff, to execute process when he is deemed an improper person. **If any exception lies to the coroners** the *venire* shall be directed to two clerks of the court, or two persons of the county named by the court and sworn. [355] And these two, who are called **elisors**, or electors, shall indifferently name the jury, and their return is final, no challenge being allowed to their array.[3]

2. Bring the bodies of the jurors.

3. There have been many statutory

When the general day of trials is fixed, the plaintiff or his attorney must bring down the record to the assises, and enter it with the proper officer, in order to its being called on in course.[4] If it be not so entered, it cannot be tried; therefore it is in the plaintiff's breast to delay any trial by not carrying down the record, unless the defendant, being fearful of such neglect in the plaintiff, and willing to discharge himself from the action, will himself undertake to bring on the trial, giving proper notice to the plaintiff. [357] Which proceeding is called the trial by *proviso,* by reason of the clause then inserted in the sheriff's *venire,* viz., "*proviso,* provided that if two writs come to your hands (that is, one from the plaintiff and another from the defendant) you shall execute only one of them." But this practice hath begun to be disused since the statute 14 Geo. II. c. 17, which enacts that if, after issue joined, the cause is not carried down to be tried according to the course of the court, the plaintiff shall be esteemed to be nonsuited, and judgment shall be given for the defendant as in case of a nonsuit. In case the plaintiff intends to try the cause, he is bound to give the defendant, if he lives within forty miles of London, eight days' **notice of trial;** and if he lives at a greater distance, then fourteen days' notice, in order to prevent surprise. And if the plaintiff then changes his mind, and does not **countermand the notice** six days before the trial, he shall be liable to pay costs to the defendant for not proceeding to trial by the same last-mentioned statute.[5] The defendant, however, or plaintiff, may, upon good cause shown to the court above, as upon

changes in the manner of selecting the jurors and in respect to their competency. As these changes differ in the different states, the local statutes must be consulted.

4. In our country, as a general rule, each county in the states, and each district in the federal system constitutes a separate court having a separate seal, a complete set of officers and records. The same judge, however, is elected to preside over the courts of several counties, where the circuit comprises more than one county.

5. The manner of making up the trial calendar or docket of cases is a matter of local practice and the local works on practice or the rules of court and statutes must be consulted.

absence or sikness of a material witness, obtain leave upon **motion to defer the trial** of the cause till the next assises.[6]

But we will now suppose all previous steps to be regularly settled, and the cause to be called on in court. The record is then handed to the judge to peruse and observe the pleadings, and what issues the parties are to maintain and prove, while **the jury is called and sworn.** To this end the sheriff returns his compulsive process (the writ of *habeas corpora,* or *distringas*), with the panel of jurors annexed, to the judge's officer in court. The jurors contained in the panel are either *special* or *common* jurors. **Special jurors** were originally introduced in trials at bar when the causes were of too great nicety for the discussion of ordinary freeholders, or where the sheriff was suspected of partiality, though not upon such apparent cause as to warrant an exception to him. He is in such case, upon motion in court and a rule granted thereupon, to attend the prothonotary or other proper officer with his freeholder's book, and the officer is to take indifferently forty-eight of the principal freeholders in the presence of the attorneys on both sides, who are each of them to strike off twelve, and the remaining twenty-four are returned upon the panel. [358] By the statute 3 Geo. II. c. 25, either party is entitled upon motion to have a special jury struck upon the trial of any issue, as well at the assises as at bar, he paying the extraordinary expense, unless the judge will certify (in pursuance of the statute 24 Geo. II. c. 18) that the cause required such special jury.[7]

6. The practice upon motions for a new trial bears a general similarity in all the states. The literature of the subject has become quite voluminous. See the local works on Practice, Bayliss' New Trials, Hayne on New Trials (western states), 2 vols., 1912.

7. Common juries, so-called, are the only sort used in the state and federal courts. So far as we know special or "struck" juries are not now in use in courts of record, though it is possible such may be the case in some states. In courts of justice of the peace, however, while no special attention is paid to the quality, the manner of selecting the six men, who usually constitute this sort of a jury, is by each party alternately striking off one name from the list of twelve, eighteen or twenty-four, as the case may be, till six remain who constitute the jury in that court for that case only.

A common jury is one returned by the sheriff according to the directions of the statute 3 Geo. II. c. 25, which appoints that the sheriff or officer shall not return a separate panel for every separate cause as formerly, but one and the same panel for every cause to be tried at the same assises containing not less than forty-eight nor more than seventy-two jurors, and that their names being written on tickets shall be put into a box or glass, and when each cause is called twelve of these persons, whose names shall be first drawn out of the box, shall be sworn upon the jury, unless absent, challenged, or excused, or unless a previous view of the messages, lands, or place in question shall have been thought necessary by the court, in which case six or more of the jurors returned, to be agreed on by the parties, or named by a judge or other proper officer of the court, shall be appointed by special writ of *habeas corpora* or *distringas* to have the matters in question shown to them by two persons named in the writ, and then such of the jury as have had the view, or so many of them as appear, shall be sworn on the inquest previous to any other jurors.[8]

As the jurors appear, when called, they shall be sworn, unless *challenged* by either party. Challenges are of two sorts: challenges to the *array,* and challenges to the *polls.*

Challenges to the array are at once an exception to the whole panel[9] in which the jury are arrayed or set in order by the sheriff in his return, and they may be made upon account of partiality or some default in the sheriff or his under-officer who arrayed the panel. [359] And generally speaking, the same reasons that before the awarding the *venire* were sufficient to have directed it to the coroners or elisors will be also sufficient to quash the array when made by a person or officer of whose partiality there is any tolerable ground of suspicion. Also, though there be no personal objection against the sheriff, yet if he arrays the panel at the nomination, or under the direction of either

8. As before stated this matter is wholly regulated by statute in this country. See the statutes and local works on Practice.

9. This sort of challenge still exists.

party, this is good cause of challenge to the array. By the policy of the ancient law, **the jury was to come de vicineto,** from the neighborhood of the vill or place where the cause of action was laid in the declaration, and therefore some of the jury were obliged to be returned from the hundred in which such vill lay, and if none were returned the array might be challenged for defect of hundredors. By statute 4 & 5 Anne, c. 6, this practice was entirely abolished upon all civil actions, except upon penal statutes, and upon those also by the 24 Geo. II. c. 18, **the jury being now only to come de corpore comitatus,** from the body of the county at large,[1] and not *de vicineto,* or from the particular neighborhood. [360]

The array by the ancient law may also be challenged if an alien be party to the suit, and upon a rule obtained by his motion to the court for a **jury de medietate linguae**[2] such a one be not returned by the sheriff, pursuant to the statute 28 Edw. III. c. 13, enforced by 8 Hen. VI. c. 29, which enact that where either party is an alien born, the jury shall be one half denizens and the other aliens (if so many be forthcoming in the place) for the more impartial trial. But where both parties are aliens no partiality is to be presumed to one more than another.

Challenges to the polls, *in capita,* are exceptions to particular jurors. [361] By the laws of England, also, in the times of Bracton and Fleta, a judge might be refused for good cause; but now the law is otherwise, and it is held that **judges and justices cannot be challenged.**[3]

Challenges to the polls are reduced to four heads: *propter honoris respectum, propter defectum, propter affectum,* and *propter delictum.*

1. **Propter honoris respectum,**[4] as if a lord of parliament be impanelled on a jury he may be challenged by either party or he may challenge himself.

2. **Propter defectum,**[5] as if a juryman be an alien born, this is defect of birth; if he be a slave or bondman, this is

1. Such is also the practice in the states.

2. Of mixed tongue. Not in use in the United States.

3. The law in some states, however, provides in such case for a change of venue.

4. On account of dignity.

5. On account of defect.

defect of liberty, and he cannot be *liber et legalis homo.*[6] [362] Under the word *homo* also, though a name common to both sexes, the female is, however, excluded *propter defectum sexus,*[7] except when a widow feigns herself with child in order to exclude the next heir, and a suppositious birth is suspected to be intended; then upon the writ *de ventre inspiciendo,*[8] a jury of women is to be impanelled to try the question, whether with child or not. But the principal deficiency is defect of estate sufficient to qualify him to be a juror. This depends upon a variety of statutes. [As to which, see the text.]

3. **Jurors may be challenged propter affectum**[9] for suspicion of bias or partiality. [363] This may be either a *principal challenge* or *to the favor.* **A principal challenge** is such where the cause assigned carries with it *prima facie* evident marks of suspicion, either of malice or favor, as that a juror is of kin to either party within the ninth degree; that he has been arbitrator on either side; that he has an interest in the cause; that there is an action depending between him and the party; that he has taken money for his verdict; that he has formerly been a juror in the same cause; that he is the party's master, servant, counselor, steward, or attorney, or of the same society or corporation with him — all these are principal causes of challenge, which, if true, cannot be overruled, for jurors must be *omni exceptione majores.*[1] **Challenges to the favor**[2] are where the party hath no principal challenge, but objects only some probable circumstances of suspicion, as acquaintance and the like, the validity of which must be left to the determination of **triors,** whose office it is to decide whether the juror be favorable or unfavorable. The triors, in case the first man called be challenged, are two indifferent persons named by the court; and if they try one man and find him indifferent he shall be sworn, and then he and the two triors shall try the next, and when another is found indif-

6. A free and legal man.
7. On account of defect of sex.
8. Concerning an examination for pregnancy.
9. On account of partiality.
1. Above all exceptions.
2. Both principal challenges and to the favor still exist though not always distinguished by name.

ferent and sworn the two triors shall be superseded, and the two first sworn on the jury shall try the rest.

4. **Challenges propter delictum**[3] are for some crime or misdemeanor that affects the juror's credit and renders him infamous, as for a conviction of treason, felony, perjury, or conspiracy, or if for some infamous offence he hath received judgment of the pillory, tumbrel, or the like, or to be branded, whipped, or stigmatized, or if he be outlawed or excommunicated, or hath been attainted of false verdict, *praemunire,* or forgery, or, lastly, if he hath proved recreant when champion in the trial by battle, and thereby hath lost his *liberam legem.*[4] [364] A juror may himself be examined on **oath of voir dire,** *veritatem dicere,* with regard to such causes or challenge as are not to his dishonor or discredit, but not with regard to any crime or anything which tends to his disgrace or disadvantage.

Besides these challenges, which are exceptions against the fitness of jurors, and whereby they may be *excluded* from serving, there are also other causes to be made use of by the jurors themselves, which are matter of **exemption,**[5] whereby their service is *excused* and not *excluded,* as by statute Westm. 2, 13 Edw. I. c. 38, sick and decrepit persons, persons not commorant in the county, and men above seventy years old; and by the statute of 7 & 8 W. III. c. 32, infants under twenty-one. This exemption is also extended by divers statutes, customs, and charters to physicians and other medical persons, counsel, attorneys, officers of the courts, and the like, all of whom, if impanelled, must show their special exemption. Clergymen are also usually excused, out of favor and respect to their function.

If by means of challenges, or other cause, a sufficient number of unexceptionable jurors doth not appear at the trial, either party may pray a *tales.* **A tales** is a supply of *such* men as are summoned upon the first panel in order to make

3. On account of crime.

As to all the above challenges the student will find statutory regulation. The statutes and local works on Practice must always be consulted.

4. This is the constant practice everywhere where the common law trial by jury exists.

5. Always a matter of statutory regulation.

up the deficiency. For this purpose a writ of *decem tales, octo tales,* and the like, was used to be issued to the sheriff at common law, and must be still so done at a trial at bar if the jurors make default. But at the assises or *nisi prius,* by virtue of the statute 35 Hen. VIII. c. 6, and other subsequent statutes, the judge is empowered at the prayer of either party to award a *tales de circumstantibus*[6] of persons present in court, to be joined to the other jurors to try the cause, who are liable, however, to the same challenges as the principal jurors. [365] This is usually done till the legal number of twelve be completed.

When a sufficient number of persons impanelled, or *tales*-men, appear, they are then separately **sworn well and truly to try the issue** between the parties, and a true verdict to give according to the evidence, and hence they are denominated the jury (*jurata*) and jurors (*sc. juratores*).[7]

The jury are now ready to hear the merits, and, to fix their attention the closer to the facts which they are impanelled and sworn to try, **the pleadings are opened to them by counsel** on that side which holds the affirmative of the question in issue. For the issue is said to lie, and proof is always first required upon that side which affirms the matter in question.[8] [366] **The opening counsel** briefly informs them what has been transacted in the court above, the parties, the nature of the action, the declaration, the plea, replication, and other proceedings, and lastly, upon what point the issue is joined which is there set down to be determined. The nature of the case and the evidence intended to be produced are next laid before them by counsel also on the same side; and when their evidence is gone through **the advocate on the other side** opens the adverse case and supports it by evidence, and then the party which began is heard by way of reply.[9] [367]

6. Such men from those standing around. This practice or some modification thereon prevails generally in this country. See the statutes.

7. Here the whole jury usually rise and are sworn at once.

8. This is the general rule unless the general issue is one of the pleas of the defendant in which case the plaintiff always opens and closes the case.

9. Sometimes with us the defendant makes his opening statement before any evidence is heard.

Evidence signifies that which demonstrates, makes clear, or ascertains the truth of the very fact or point in issue, either on the one side or on the other,[1] and no evidence ought to be admitted to any other point.

Evidence in the trial by jury is of two kinds, either that which is given in proof or that which the jury may receive by their own private knowledge.[2] The former, or **proofs** (to which in common speech the name of evidence is usually confined), are either written or *parol,* that is, by word of mouth. **Written proofs,** or evidence, are, 1. Records,[3] and 2. Ancient deeds of thirty years standing which prove themselves;[4] but 3. Modern deeds, and 4. Other writings, must be attested and verified by *parol* evidence of witnesses. [368] And the one general rule that runs through all the doctrine of trials is this, that **the best** [legal] **evidence the nature of the case will admit of shall always be required, if possible to be had,** but if not possible, then the best [legal] evidence that can be had shall be allowed.[5] For if

1. The student is especially referred to the able and exhaustive work on Evidence by Mr. Chamberlayne.

2. Not allowable. All evidence must be given in open court.

3. Proved by the proper official custodian or by properly certified copies.

4. If produced from the proper custody.

5. No rule of law is more frequently cited, and more generally misconceived, than this. It is certainly true when rightly understood; but it is very limited in its extent and application. It signifies nothing more than that, if the best *legal* evidence cannot possibly be produced, the next best *legal* evidence shall be admitted. Evidence may be divided into primary and secondary; and the secondary evidence is as accurately defined by the law as the primary. But in general the want of better evidence can never justify the admission of hearsay, or the copies of copies, etc. Where there are exceptions to general rules, these exceptions are as much recognized by the law as the general rule; and where boundaries and limits are established by the law for every case that can possibly occur, it is immaterial what we call the rule, and what the exception.

If the subscribing witness be living and within the jurisdiction of the court, he must be called to prove the execution; or if he cannot be found, and that fact be satisfactorily explained, proof of his hand-writing will be sufficient evidence of the execution. Barnes v. Trompowsky, 7 T. R. 266. And the witness of the execution is necessary; acknowledgment of the party who executed the deed cannot be received. Johnson v. Mason, 1 Esp. 89. At least only as secondary evidence. Call, Bart. v. Dunning, 4 East, 53. And acknowledgment to a subscribing witness by an obligor of a bond that he has exe-

it be found that there is any better evidence existing than is produced, the very not producing it is a presumption that it would have detected some falsehood that at present is concealed. Thus, in order to prove a lease for years, nothing else shall be admitted but the very deed of lease itself, if in being; but if that be positively proved to be burnt or destroyed (not relying on any loose negative, as that it cannot be found, or the like), then an attested copy may be produced, or *parol* evidence be given of its contents. So, no evidence of a discourse with another will be admitted, but the man himself must be produced; yet in some cases (as in proof of any general customs, or matters of common tradition or repute), the courts admit of **hearsay**[6] evidence, or an account of what persons deceased have declared in their lifetime; but such evidence will not be received of any particular facts. So, too, books of account or shop-books are not allowed of themselves to be given in evidence for the owner, but a servant who made the entry may have recourse to them to refresh his memory; and if such servant (who was accustomed to make those entries) be dead, and his hand be proved, the book may be read in evidence.[7]

With regard to parol evidence, or *witnesses,* it must first be remembered that there is a process to bring them in by writ of **subpoena ad testificandum,**[8] which commands them, laying aside all pretences and excuses, to appear at the trial on pain of 100*l.* to be forfeited to the king, to which

cuted it, is sufficient. Powell v. Blackett, 9 Esp. 87; and see Grellier v. Neale, Peake, 146. But a mere bystander may not be received to supply the absence of the subscribing witness (M'Craw v. Gentry, 3 Campb. 232), or only as secondary evidence, see the next case. If the apparent attesting witness deny that he saw the execution, secondary evidence is admissible; that is to say, the handwriting of the obligor, etc., may be proved. Ley v. Ballard, 3 Esp. 173 n. And, as a general rule, it seems that wherever a subscribing witness appears to an instrument, note, etc., he must be called or his absence explained. See Higgs v. Dixon, 2 Stark. 180; Breton v. Cope, Peake, 31. See Chamberlayne on Evidence, § 464 *et seq.*; Id., § 2574 *et seq.*

6. See, generally, Chamberlayne on Evidence, §§ 464, 2574.

7. See the leading case of Price v. The Earl of Torrington, Salk. 285; 1 Smith's Lead. Cas. *390 and note.

8. This is the ordinary subpœna in universal use.

the statute 5 Eliz. c. 9, has added a penalty of 20*l.* to the party aggrieved, and damages equivalent to the loss sustained by want of his evidence. [369] But no witness, unless his reasonable expenses be tendered him, is bound to appear at all;[9] nor, if he appears, is he bound to give evidence till such charges are actually paid him, except he resides within the bills of mortality, and is summoned to give evidence within the same. This compulsory process to bring in unwilling witnesses, and the additional terrors of **an attachment in case of disobedience,**[1] are of excellent use in the thorough investigation of truth.

All witnesses, of whatever religion[2] **or country,** that have the use of their reason, are to be received and examined, **except such as are infamous** or such as are **interested** in the event of the cause. All others are *competent* witnesses, though the jury from other circumstances will judge of their *credibility.* **Infamous persons** are such as may be challeneged as jurors, *propter delictum,* and therefore never shall be admitted to give evidence to inform that jury with whom they were too scandalous to associate. [370] **Interested witnesses**[3] may be examined upon a *voir dire,* if suspected to be secretly concerned in the event, or their interest may be proved in court,— which last is the only method of supporting an objection to the former class, for no man is to be examined to prove his own infamy. **And no counsel, attorney,** or other person intrusted with the secrets of the cause by the party himself, shall be compelled, or perhaps allowed, to give evidence of such conversation or matters of privacy as came to his knowledge by virtue of such trust and confidence; but he may be examined as to mere matters of fact, as the execution of a deed, or the like, which might have come to his knowledge without being intrusted in the cause.[4]

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9. So now, but the amount is fixed by statute.

1. Still the practice.

2. See the leading case of Omichund v. Barker, Willes, 538; 1 Smith's Lead Cas. *535.

3. The general tendency of modern legislation is to remove all objections to competency on the ground of interest and to make them extend solely to the credibility of the witness. Consult the local statutes.

4. This is the well-settled rule of law everywhere both in civil and criminal cases.

One witness (if credible [and believed by the jury]) **is sufficient evidence** to a jury of any singe facts, though undoubtedly the concurrence of two or more corroborates the proof.[5]

Positive proof is always required where from the nature of the case it appears it might possibly have been had. [371] But next to *positive* proof **circumstantial evidence,** or the doctrine of **presumptions,** must take place; for when the fact itself cannot be demonstratively evinced, that which comes nearest to the proof of the fact is the proof of such circumstances which either *necessarily* or *usually* attend such facts, and these are called presumptions, which are only to be relied upon till the contrary be actually proved. **Violent presumption** is many times equal to full proof, for there those circumstances appear which *necessarily* attend the fact. As if a landlord sues for rent due at Michaelmas, 1754, and the tenant cannot prove the payment, but produces an acquittance for rent due at a subsequent time, in full of all demands, this is a violent presumption of his having paid the former rent, and is equivalent to full proof; for though the actual payment is not proved, yet the acquittance in full of all demands is proved, which could not be without such payment, and it therefore induces so forcible a presumption that no proof shall be admitted to the contrary.[6] **Probable presumption** arising from such circumstances as *usually* attend the fact hath also its due weight; as if, in a suit for rent due in 1754, the tenant proves the payment of the rent due in 1755; this will prevail to exonerate the tenant, unless it be clearly shown that the rent of 1754 was retained for some special reason, or that there was some fraud or mistake; for other-

5. There are several cases where more than one witness is required, e. g., in treason, perjury (both considered in Book 4); in chancery to overcome a responsive answer required to be under oath (see vol. 2, this series); in divorce cases (see local works on Practice), and possibly other cases.

Courts, on the other hand, limit the number of witnesses on one point, e. g., character witnesses (Chamberlayne on Evidence, § 3326); of experts. Id., §§ 1804, note, 2276, note.

6. A receipt may be explained by parol evidence. Chamberlayne on Evidence, § 1364, note 4.

wise it will be presumed to have been paid before that in 1755, as it is most usual to receive first the rents of longest standing. **Light or rash presumptions** have no weight or validity at all.

The oath administered to the witness is not only that what he deposes shall be true, but that he shall also depose the *whole* truth; so that he is not to conceal any part of what he knows, whether interrogated particularly to that point or not. [372] And all this evidence is to be given in open court, in the presence of the parties, their attorneys, the counsel, and all by-standers, and before the judge and jury; each party having liberty to except[7] to its competency, which **exceptions** are publicly stated, and by the judge are openly and publicly allowed or disallowed, in the face of the country. And if, either in his directions or decisions, he mistakes the law by ignorance, inadvertence, or design, the counsel on either side may require him publicly to seal **a bill of exceptions**, stating the point wherein he is supposed to err; and this he is obliged to seal by statute Westm. 2, 13 Ed. I. c. 31, or if he refuses so to do, the party may have a compulsory writ against him, commanding him to seal it, if the fact alleged be truly stated; and if he returns that the fact is untruly stated when the case is otherwise, an action will lie against him for making a false return. This bill of exceptions is in the nature of an appeal, examinable, not in the court out of which the record issues for the trial at *nisi prius*, but in the next immediate superior court, upon a writ of error, after judgment given in the court below.[8] **But a demurrer to evidence** shall be determined by the court out of which the record is sent. This happens where a record or other matter is produced in evidence concerning the legal consequences of which there arises a doubt in law, in which case the adverse party may if

7. The word "object" is now commonly used and "except" to refer to the reservation of an objection to the court's ruling thereon.

8. A bill of exceptions is in the states usually settled after the ruling upon a motion for a new trial. Its office is to incorporate into the record for review those matters which are not part of the common law record. Consult local statutes and works on Practice.

he pleases demur to the whole evidence; which admits the truth of every fact that has been alleged, but denies the sufficiency of them all in point of law to maintain or overthrow the issue, which draws the question of law from the cognizance of the jury to be decided (as it ought) by the court. But neither these demurrers to evidence[9] nor the bills of exceptions[1] are at present so much in use as formerly, since the more frequent extension of the discretionary powers of the court in **granting a new trial**, which is now very commonly had for the misdirection of the judge at *nisi prius*.[2] [373]

As to such evidence as the jury may have by their private knowledge of facts, it was an ancient doctrine that this had as much right to sway their judgment as the written or parol evidence which is delivered in court. [374] And therefore it hath been often held that though no proofs be produced on either side, yet the jury might bring in a verdict. For the oath of the jurors, to find according to their evidence, was construed to be, to do it according to the best of their own knowledge. But with new trials, the practice seems to have been first introduced, which now universally obtains, that if a juror knows anything of the matter in issue, he may be sworn as a witness and give his evidence publicly in court. [375]

When the evidence is gone through on both sides, the judge, in the presence of the parties, the counsel, and all others, **sums up** the whole to the jury, omitting all superfluous circumstances, observing wherein the main question and principal issue lies, stating what evidence has been given to support it, with such remarks as he thinks necessary for their direction, and giving them his opinion in matters of law arising upon that evidence.[3]

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9. Still in use in some jurisdictions, but the more common practice is to move the court to direct a verdict for insufficiency of the plaintiff's evidence. Chamberlayne on Evidence, §§ 140-144 and notes.

1. Bills of exceptions are in common use in the states.

2. The literature of new trials is voluminous. See Hayne on New Trials, 2 vols. (1912); Bayliss' New Trials, 2d Ed. (1900). Still after the overruling of a motion for a new trial, a bill of exceptions and appeal or writ of error often follow as a means of review.

3. Under our practice the counsel having the burden of proof opens and

The jury, after the proofs are summed up, unless the case be very clear, withdraw from the bar to consider of their **verdict**; and, in order to avoid intemperance and causeless delay, are to be kept without meat, drink, fire, or candle, unless by permission of the judge, till they are all unanimously agreed. If our juries eat or drink at all, or have any eatables about them, without consent of the court, and before verdict, it is finable; and if they do so at his charge for whom they afterwards find, it will set aside the verdict. Also if they speak with either of the parties or their agents, after they are gone from the bar, or if they receive any fresh evidence in private, or if, to prevent disputes, they cast lots for whom they shall find, any of these circumstances will entirely vitiate the verdict.[4] [376]

When they are all unanimously agreed, the jury return back to the bar, and, before they deliver their verdict, the plaintiff is bound to appear in court, by himself, attorney, or counsel, in order to answer the amercement to which by the old law he is liable, in case he fails in his suit, as a punishment for his false claim. The amercement is disused, but the form still continues; and if the plaintiff does not appear, no verdict can be given, but the plaintiff is said to be **nonsuit,** *non sequitur clamorem suum.*[5] Therefore it is usual for a plaintiff, when he or his counsel perceives that he has not given evidence sufficient to maintain his issue, to be voluntarily nonsuited, or withdraw himself; whereupon the crier is ordered to *call the plaintiff,* and if neither he nor anybody for him appears, he is nonsuited, the jurors are discharged, the action is at an end, and the defendant shall

closes the argument to the jury and the charge or instructions of the court is not given till arguments of counsel are finished. In many states there are statutes prohibiting the expression of any opinion or comment on the facts by the judge and often it is required that his so-called instructions be in writing; in other words the judge is substantially reduced to the position of a moderator. In our judgment this is a most vicious practice and one that often defeats the ends of justice. The judge should be allowed to sum up and required to *instruct* the jury.

4. See works on New Trials cited above; also Chamberlayne on Evidence, § 306 *et seq.*

5. He does not follow up his complaint. We do not understand that the plaintiff will now be nonsuited for nonappearance.

recover his costs. The reason of this practice is that a **nonsuit is more eligible for the plaintiff than a verdict against him**, for after a nonsuit, which is only a default, he may commence the same suit again for the same cause of action; but after a verdict had, and judgment consequent thereupon, he is [unless the same is reversed] forever barred from attacking the defendant upon the same ground of complaint. [377] But in case the plaintiff appears, the jury by their foreman deliver in their verdict.

A verdict, *vere dictum*, is either *privy* or *public*. **A privy verdict** is when the judge hath left or adjourned the court; and the jury, being agreed, in order to be delivered from their confinement, obtain leave to give their verdict privily to the judge out of court, which privy verdict is of no force unless afterwards affirmed by a public verdict given openly in court, wherein the jury may, if they please, vary from the privy verdict.[6] So that the privy verdict is indeed a mere nullity; and yet it is a dangerous practice, allowing time for the parties to tamper with the jury, and therefore very seldom indulged. But the only effectual and legal verdict is the **public verdict**, in which they openly declare to have found the issue for the plaintiff or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff in consequence of the injury upon which the action is brought.

Sometimes, if there arises in the case any difficult matter of law, the jury, for the sake of better information and to avoid the danger of having their verdict attainted, will find a **special verdict**,[7] which is grounded on the statute of Westm. 2, 13 Edw. I. c. 30, § 2. And herein they state the naked facts as they find them to be proved, and pray the advice of the court thereon, concluding conditionally, that if upon the whole matter the court should be of opinion that the plaintiff had cause of action, they then find for the plaintiff; if otherwise, then for the defendant. This is

6. Or sealed verdict by consent of counsel.

7. By statute in some states the jury may be required to find specially upon certain questions submitted to them, as well as to find a general verdict. Consult local statutes and works on Practice.

entered at length on the record, and afterwards argued and determined in the court at Westminster from whence the issue came to be tried.

Another method of finding a species of special verdict is when the jury find a verdict generally for the plaintiff, but subject, nevertheless, to the opinion of the judge or the court above, **on a special case** stated by the counsel on both sides with regard to a matter of law, which has this advantage over a special verdict, that it is attended with much less expense and obtains a much speedier decision, and *postea* (of which in the next chapter) being stayed in the hands of the officer of *nisi prius* till the question is determined, and the verdict is then entered for the plaintiff or defendant, as the case may happen.[8] [378] But, as nothing appears upon the record but the general verdict, the parties are precluded hereby from the benefit of a writ of error, if dissatisfied with the judgment of the court or judge upon the point of law. But in both these instances the jury may, if they think proper, take upon themselves to determine, at their own hazard, the complicated question of fact and law; and, without either special verdict or special case, may find a verdict absolutely either for the plaintiff or defendant.

When the jury have delivered in their verdict, and it is recorded in court, they are then discharged. And so ends the trial by jury. The principal defects of the system seem to be,

1. **The want of a complete discovery by the oath of the parties.** This each of them is now entitled to have, by going through the expense and circuity of a court of equity, and therefore it is sometimes had by consent, even in the courts of law.[9] [382]

2. **A second defect is the want of a compulsive power for the production of books and papers belonging to the parties.**[1] In the hands of third persons they can generally be obtained by rule of court, or by adding a clause of requi-

8. See statutes and local works on Practice.

9. In many of the states either party may be called and examined as a witness. Consult local statutes.

1. See local statutes.

sition to the writ of *subpoena*, which is then called a **subpoena duces tecum.**[2]

3. **Another want is that of powers to examine witnesses abroad,** and to receive their depositions in writing where the witnesses reside, and especially when the cause of action arises in a foreign country. [383] To which may be added the power of examining witnesses that are aged, or going abroad, upon interrogatories *de bene esse,* to be read in evidence if the trial should be deferred till after their death or departure, but otherwise to be totally suppressed. Both these are now very frequently effected by mutual consent if the parties are open and candid, and they may also be done indirectly at any time, through the channel of a court of equity; but such a practice has never yet been directly adopted as the rule of a court of law.[3] Yet where the cause of action arises in India, and a suit is brought thereupon in any of the king's courts at Westminster, the court may issue a commission to examine witnesses upon the spot and transmit the depositions to England.

4. The courts of law will [in case of local prejudice on the part of the jurors] in *transitory* actions very often **change the venue,** or county wherein the cause is to be tried; but in *local* actions, though they sometimes do it indirectly and by mutual consent, yet to effect it directly and absolutely, the parties are driven to a court of equity, where, upon making out a proper case, it is done upon the ground of being necessary to a fair, impartial, and satisfactory trial.[4] [384]

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2. Under penalty bring with you. This writ is in common use.

3. These defects have in many states been remedied by statutes. Consult the local statutes and books on Practice.

4. This may now be done in a court of law. Tidd (8th Ed.), 655. See local statutes and works on Practice.

CHAPTER XXIV.

OF JUDGMENT AND ITS INCIDENTS.

If the issue be an issue of fact, whatever is done subsequent to the joining of issue and awarding the trial, it is entered on record, and is called a **postea.** [386] The substance of which is, that *postea, afterwards,* the said plaintiff and defendant appeared by their attorneys at the place of trial, and a jury, being sworn, found such a verdict, or that the plaintiff, after the jury sworn, made default and did not prosecute his suit, or as the case may happen. This is added to the roll, which is now returned to the court from which it was sent, and the history of the cause from the time it was carried out is thus continued by the *postea.*[1]

Next follows, sixthly, the judgment of the court upon what has previously passed, both the matter of law and matter of fact being now fully weighed and adjusted. Judgment may, however, for certain causes be **suspended,** or finally **arrested,** for it cannot be entered till the next term after trial had, and that upon notice to the other party.[2] [387] So that if any defect of justice happened at the trial by surprise, inadvertence, or misconduct, the party may have relief in the court above by obtaining a new trial; or if, notwithstanding the issue of fact be regularly decided, it appears that the complaint was either not actionable in itself or not made with sufficient precision and accuracy, the party may supersede it by arresting or staying the judgment.

1. **Causes of suspending the judgment by granting a new trial** are at present wholly *extrinsic,* arising from matter foreign to or *dehors* the record. Of this sort are **want of notice of trial,** or any flagrant **misbehavior** of the party

1. Under our practice no *postea* in the sense of the author is required, although, of course, all the findings appear on file or in the entries on the books of records.

2. Entered of course with us, unless stayed by motion for new trial or in arrest of judgment which are, as a rule, considered as one motion. See local works on Practice.

prevailing towards the jury which may have influenced their verdict, or any gross misbehavior of the jury among themselves; also, if it appears by the judge's report, certified by the court, that the jury have brought in a **verdict without or contrary to evidence**, so that he is reasonably dissatisfied therewith, or if they have given **exorbitant damages**, or if the judge himself has **misdirected the jury**, so that they found an unjustifiable verdict,— for these and other reasons of the like kind it is the practice of the court to award a *new*, or second, *trial*. But if two juries agree in the same or a similar verdict, a third trial is seldom awarded; for the law will not readily suppose that the verdict of any one subsequent jury can countervail the oaths of the two preceding ones.

A new trial is a rehearing of the cause before another jury, but with as little prejudice to either party as if it had never been heard before. [391] No advantage is taken of the former verdict on the one side, or the rule of court for awarding such second trial on the other.

A sufficient ground must, however, be laid before the court to satisfy them that it is necessary to justice that the cause should be farther considered. If the matter be such as did not or could not appear to the judge who presided at *nisi prius*, it is disclosed to the court by *affidavit*;[3] if it arises from what passed at the trial, it is taken from the judge's information, who usually makes a special and minute report of the evidence. Counsel are heard on both sides to impeach or establish the verdict, and the court give their reasons at large why a new examination ought or ought not to be allowed. [392] Nor do the courts lend too easy an ear to every application for a review of the former verdict. They must be satisfied that there are strong probable grounds to suppose that the merits have not been fairly and fully discussed, and that the decision is not agreeable to the justice and truth of the case. A new trial is not granted where the value is too inconsiderable to merit a

3. See preceding notes. The evidence in support of a new trial is usually presented by affidavit. The proceedings on the motion for a new trial are included in the record, when necessary, by a bill of exceptions.

second examination. It is not granted upon nice and formal objections which do not go to the real merits. It is not granted in cases of strict right or *summum jus,* where the rigorous exaction of extreme legal justice is hardly reconcilable to conscience. Nor is it granted where the scales of evidence hang nearly equal; that which leans against the former verdict ought always very strongly to preponderate.

In granting such farther trial (which is matter of sound discretion) the court has also an opportunity, which it seldom fails to improve, of supplying those defects in this mode of trial which were stated in the preceding chapter, by **laying the party applying under all such equitable terms** as his antagonist shall desire and mutually offer to comply with, such as the discovery of some facts upon oath, the admission of others not intended to be litigated, the production of deeds, books, and papers, the examination of witnesses, infirm, or going beyond sea, and the like. And the delay and expense of this proceeding are so small and trifling that it seldom can be moved for to gain time or to gratify humor. The motion must be made within the first four days of the next succeeding term, within which term it is usually heard and decided.

2. **Arrests of judgment arise from intrinsic causes appearing upon the face of the record.** Of this kind are, first, where the **declaration varies totally from the original writ** [or process], as where the writ is in debt or detinue, and the plaintiff declares in an action on the case for an *assumpsit.* Also, secondly, where the **verdict materially differs from the pleadings and issue thereon**, as if in an action for words it is laid in the declaration that the defendant said, "the plaintiff *is* a bankrupt," and the verdict finds specially that he said, "the plaintiff *will be* a bankrupt."[4] Or, thirdly, **if the case laid in the declaration is not sufficient** in point of law to found an action upon. And this is an invariable

4. If a verdict is taken generally, with entire damages, judgment may be arrested if any one count in the declaration is bad; but if there is a general verdict of guilty upon an indictment consisting of several counts, and any one count is good, that is held to be sufficient. Doug. 730.

rule with regard to arrests of judgment upon matter of law, "that **whatever is alleged in arrest of judgment must be such matter as would upon demurrer have been sufficient to overturn the action or plea.**" [394] As if, on an action for slander in calling the plaintiff a Jew, the defendant denies the words, and issue is joined thereon. Now, if a verdict be found for the plaintiff that the words were actually spoken, whereby the fact is established, still the defendant may move in arrest of judgment that to call a man a Jew is not actionable; and if the court be of that opinion the judgment shall be arrested and never entered for the plaintiff. **But the rule will not hold e converso,**[5] "that everything that may be alleged as cause of demurrer will be good in arrest of judgment;" for if a declaration or plea omits to state some particular circumstance, without proving of which at the trial it is impossible to support the action or defence, this omission shall be aided by a verdict, as if, in an action of trespass, the declaration doth not allege that the trespass was committed on any certain day, though this defect might be good cause to demur to the declaration or plea, yet if the adverse party omits to take advantage of such omission in due time, but takes issue, and has a verdict against him, this exception cannot after verdict be moved in arrest of judgment. For the verdict ascertains those facts which before, from the inaccuracy of the pleadings, might be dubious, since the law will not suppose that a jury under the inspection of a judge would find a verdict for the plaintiff or defendant unless he had proved those circumstances without which his general allegation is defective. Exceptions, therefore, that are moved in arrest of judgment must be much more material and glaring than such as will maintain a demurrer, or, in other words, many inaccuracies and omissions, which would be fatal if early observed, are cured by a subsequent verdict, and not suffered in the last stage of a cause to unravel the whole proceedings. **But if the thing omitted be essential to the action or defence,** as if the plaintiff does not merely state his title in a defective manner, but sets forth a title

5. To the contrary.

that is totally defective in itself, or if to an action of debt the defendant pleads *not guilty* instead of *nil debet,* these cannot be cured by a verdict for the plaintiff in the first case, or for the defendant in the second. [395]

If, by the misconduct or inadvertence of the pleaders, the issue be joined on a fact totally immaterial, or insufficient to determine the right, so that the court upon the finding cannot know for whom judgment ought to be given, as if, in an action on the case in *assumpsit* against an executor, he pleads that he himself (instead of the testator) made no such promise. In this case the court will after verdict award a **repleader** *quod partes replacitant,*[6] unless it appears from the whole record that nothing material can possibly be pleaded in any shape whatsoever, and then a pleader would be fruitless. And whenever a repleader is granted, the pleadings must begin *de novo* at that stage of them, whether it be the plea, replication, or rejoinder, &c., wherein there appears to have been the first defect or deviation from the regular course.[7]

If judgment is not by some of these means arrested within the first four days of the next term after the trial, it is then to be entered on the roll or record. **Judgments are the sentence of the law,** pronounced by the court upon the matter contained in the record, and are of four sorts: First, where the facts are confessed by the parties and the law determined by the court, as in case of judgment **upon demurrer;** secondly, where the law is admitted by the parties and the facts disputed, as in case of judgment **on a verdict;** thirdly, where both the fact and the law arising thereon are admitted by the defendant, which is the case of judgments **by confession or default;** or, lastly, where the plaintiff is convinced that either fact, or law, or both, are insufficient to support his action, and therefore abandons or withdraws his prosecution, which is the case in judgments upon a **nonsuit or retraxit.** [396]

The judgment, though pronounced or awarded by the

6. That the parties replead.

7. In probably all the states there are now liberal statutes of amendments and jeofails. See Rev. Stat. Ill., ch. 7. Consult local statutes and books on Practice.

judges, is not their determination or sentence, but the determination and sentence of *the law*. Therefore the style of the judgment is, not that it is decreed or resolved by the court, for then the judgment might appear to be their own, but "**it is considered,**" *consideratum est per curiam,*[8] that the plaintiff do recover his damages, his debt, his possession, and the like, which implies that the judgment is none of their own, but the act of law, pronounced and declared by the court after due deliberation and inquiry.

All these species of judgments are either *interlocutory* or *final*. **Interlocutory** judgments are such as are given in the middle of a cause upon some plea, proceeding, or default, which is only intermediate and does not finally determine or complete the suit. Of this nature are all judgments for the plaintiff upon pleas in abatement of the suit or action, in which it is considered by the court that the defendant do answer over, *respondeat ouster,* that is, put in a more substantial plea. [397] But the interlocutory judgments most usually spoken of are those incomplete judgments, whereby the *right* of the plaintiff is indeed established, but the *quantum* of damages sustained by him is not ascertained, which is a matter that cannot be done without the intervention of a jury. This can only happen where the plaintiff recovers, for when judgment is given for the defendant it is always complete as well as final. And this happens, in the first place, where the defendant suffers judgment to go against him by **default,** or *nihil dicit;*[9] as if he puts in no plea at all to the plaintiff's declaration, by **confession** or *cognovit actionem,*[1] where he acknowledges the plaintiff's demand to be just; or by **non sum informatus,**[2] when the defendant's attorney declares he has no instruction to say anything in answer to the plaintiff or in defence of his client, which is a species of judgment by default. If these, or any of them, happen in **actions where the specific thing sued for is recovered,** as in actions of debt for a sum certain, the judgment is absolutely complete. And therefore it is very usual, in order to strengthen a creditor's security, for

8. It is considered by the court.
9. He says nothing.
1. He confesses the action.
2. I am not informed.

the debtor to execute a **warrant of attorney** to some attorney named by the creditor, empowering him **to confess a judgment**[3] by either of the ways just now mentioned (by *nihil dicit, cognovit actionem,* or *non sum informatus*) in an action of debt to be brought by the creditor against the debtor for the specific sum due; which judgment, when confessed, is absolutely complete and binding, provided the same (as is also required in all other judgments) be regularly *docquetted,* that is, abstracted and entered in a book, according to the directions of statute 4 & 5 W. & M. c. 20. [398] **But where damages are to be recovered, a jury must be called in to assess them,** unless the defendant, to save charges, will confess the whole damages laid in the declaration; otherwise the entry of the judgment is "that the plaintiff ought to recover his damages (indefinitely), but because the court know not what damages the said plaintiff hath sustained, therefore the sheriff is commanded, that by the oaths of twelve honest and lawful men he inquire into the said damages, and return such inquisition into court." This process is called a **writ of inquiry,** in the execution of which the sheriff sits as judge, and tries by a jury, subject to nearly the same laws and conditions as the trial by jury at *nisi prius,* what damages the plaintiff hath really sustained;[4] and when their verdict is given, which must assess *some* damages, the sheriff returns the inquisition, which is entered upon the roll in manner of a *postea,* and thereupon it is considered that the plaintiff do recover the exact sum of the damages so assessed. In like manner, when a demurrer is determined for the plaintiff upon an action wherein damages are recovered, the judgment is also incomplete without the aid of a writ of inquiry.

Final judgments are such as at once put an end to the

3. A very common practice now. The authority is often made a part of the security, i. e., written or printed on the same paper.

4. This practice may still prevail in some of the states, but a more simple and expeditious proceeding is usually provided by statute. See the local statutes and books on Practice. Where a case is tried before a jury, the jury, if they find for the plaintiff, usually assess his damages in the verdict.

action by declaring that the plaintiff has either entitled himself, or has not, to recover the remedy he sues for.

In which case, if the judgment be for the plaintiff, it is also considered that the defendant be either amerced for his wilful delay of justice in not immediately obeying the king's writ by rendering the plaintiff his due, or be taken up, *capitur*, till he pays a fine to the king for the public misdemeanor which is coupled with the private injury in all cases of force, etc. But if judgment be for the defendant, then in case of fraud and deceit to the court, or malicious or vexatious suits, the plaintiff may also be fined: but in most cases it is only considered that he and his pledges of prosecuting be (nominally) amerced for his false claim, *pro falso clamore suo*, and that the defendant may go thereof without a day, *eat inde sine die*, that is, without any farther continuance or adjournment, the king's writ commanding his attendance being now fully satisfied and his innocence publicly cleared. [399]

Thus much for judgments, to which **costs are a necessary appendage,** it being now [by statute] as well the maxim of ours as of the civil law, that "*victus victori in expensis condemnandus est;*"[5] though the common law did not professedly allow any, the amercement of the vanquished party being his only punishment. **These cases on both sides are taxed** and moderated by the prothonotary, or other proper officer of the court.

After judgment is entered execution will immediately follow, unless the party condemned thinks himself unjustly aggrieved by any of these proceedings, and then he has his remedy to reverse them by several writs in the nature of appeals, which we shall consider in the succeeding chapter. [401]

5. This is, in a small way, a repetition of the maxim that "to the victor belong the spoils." The amount of the costs, when allowed, and how taxed are regulated by statute.

CHAPTER XXV.

OF PROCEEDINGS IN THE NATURE OF APPEALS.

Proceedings in the nature of appeals from the proceedings of the king's courts of law are principally four. [402]

I. **A writ of attaint,** which lieth to inquire whether a jury of *twelve* men gave a false verdict, that so the judgment following thereupon may be reversed; and this must be brought in the lifetime of him for whom the verdict was given, and of two at least of the jurors who gave it. [Obsolete.] The jury who are to try this false verdict must be twenty-four, and are called the grand jury. He that brings the attaint can give no other evidence to the grand jury than what was originally given to the petit. But those against whom it is brought are allowed, in affirmance of the first verdict, to produce new matter, because the petit jury may have formed their verdict upon evidence of their own knowledge which never appeared in court. [404]

II. **The writ of deceit, or action on the case in nature of it,** may be brought in the Court of Common Pleas to reverse a judgment there had by fraud or collusion in a real action whereby lands and tenements have been recovered to the prejudice of him that hath right. [405] [Obsolete.]

III. **An audita querela** is where a defendant, against whom judgment is recovered and who is therefore in danger of execution, or perhaps actually in execution, may be relieved upon good matter of discharge which has happened since the judgment; as if the plaintiff hath given him a general release, or if the defendant hath paid the debt to the plaintiff without procuring satisfaction to be entered on the record. In these and the like cases wherein the defendant hath good matter to plead, but hath had no opportunity of pleading it (either at the beginning of the suit or *puis darrein continuance*,[1] which must always be before judgment), an *audita querela* lies, in the nature of a bill in equity, to be relieved against the oppression of the plaintiff. It is a writ directed to the court stating that the complaint of the defendant hath been heard, *audita querela defendentis*,[2] and

1. Since the last continuance.

2. The complaint of the defendant having been heard.

then setting out the matter of the complaint, it at length enjoins the court to call the parties before them, and, having heard their allegations and proofs, to cause justice to be done between them. It also lies for bail when judgment is obtained against them by *scire facias* to answer the debt of their principal, and it happens afterwards that the original judgment against their principal is reversed; for here the bail, after judgment had against them, have no opportunity to *plead* this special matter, and therefore they shall have redress by *audita querela*. But the indulgence now shown by the courts in granting a **summary relief upon motion,**[3] in cases of such evident oppression, has almost rendered useless the writ of *audita querela,* and driven it quite out of practice. [406]

IV. But, fourthly, the principal method of redress for erroneous judgments in the king's court of record is by **writ of error** to some superior court of appeal.

A writ of errror lies for some supposed mistake in the proceedings of a court of record; for to amend errors in a base court, not of record, a writ of *false judgment* lies. The writ of error only lies upon matter of *law* arising upon the face of the proceedings; so that no evidence is required to substantiate or support it, there being no method of reversing an error in the determination of *facts*, but by an attaint or a new trial, to correct the mistakes of the former verdict.

When once the record was made up, it was formerly held that by the common law **no amendment** could be permitted, unless within the very term in which the judicial act so recorded was done; for during the term the record is in the breast of the court, but afterwards it admitted of no alteration. **But now the courts are become more liberal,** and, where justice requires it, will allow of amendments at any time while the suit is depending, notwithstanding the record be made up and the term be past. For they at present consider the proceedings as in *fieri,* till judgment is given, and therefore that, till then, they have power to permit amendments by the common law; **but when judgment is**

3. Special motion supported by affidavit.

once given and enrolled,[4] no amendment is permitted in any subsequent term.[5] [407] Mistakes are also effectually helped by the **statutes of amendment and jeofails,**[6] so called because when a pleader perceives any slip in the form of his proceedings, and acknowledges such error (*jeo faile*), he is at liberty by those statutes to amend it; which amendment is seldom actually made, but the benefit of the acts is attained by the courts overlooking the exception. These statutes are many in number, and by them all trifling exceptions are so thoroughly guarded against that writs of error cannot now be maintained but for some material mistake assigned.

If a writ of error[7] **be brought to reverse any judgment** of an inferior court of record, where the damages are less than ten pounds, or if it is brought to reverse the judgment of any superior court after verdict, he that brings the writ, or that is plaintiff in error, must (except in some peculiar cases) find **substantial pledges of prosecution** or bail, to prevent delays by frivolous pretences to appeal, and for securing payment of costs and damages, which are now payable by the vanquished party in all, except in a few particular instances. [411]

Each court of appeal, in their respective stages, may, upon hearing the matter of law in which the error is assigned, reverse or affirm the judgment of the inferior courts, but none of them are final save only the House of Peers, to whose judicial decisions all other tribunals must therefore submit and conform their own.

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4. Enrollment in the sense here used is no longer necessary.

5. Where the judgment has been entered and the term ended, without any stay order on a motion for a new trial, there can be no amendment of the record unless the minute books, entries or files contain matter sufficient to serve as a basis for the amendment.

6. See Rev. Stat. Ill., ch. 7, and *ante*, p. *454, note.

7. The ordinary method of review in an appellate jurisdiction of the judgment of an inferior court is by an appeal or writ of error, the latter of which is a new suit begun in the appellate court, while the former is prayed and allowed in the court below.

CHAPTER XXVI.

OF EXECUTION.

If the regular judgment of the court, after the decisions of the suit, be not suspended, superseded, or reversed by one or other of the methods mentioned in the two preceding chapters, the next and last step is the **execution** of that judgment, **or putting the sentence of the law in force.** [412] This is performed in different manners, according to the nature of the action upon which it is founded, and of the judgment which is had or recovered.

If the plaintiff recovers in an action, real[1] **or mixed,** whereby the seisin or possession of land is awarded to him, the writ of execution shall be an *habere facias seisinam,* or **writ of seisin** of a freehold, or an *habere facias possessionem,* or **writ of possession** of a chattel interest. These are writs directed to the sheriff of the county, commanding him to give actual possession to the plaintiff of the land so recovered, in the execution of which the sheriff may take with him the *posse comitatus,* or power of the county; and may justify breaking open doors, if the possession be not quietly delivered. But if it be peaceably yielded up, the delivery of a twig, a turf, or the ring of the door, in the name of seisin, is sufficient execution of the writ.

In other actions, where the judgment is that something in special be done or rendered by the defendant, then, in order to compel him so to do, and to see the judgment executed, a special writ of execution issues to the sheriff according to the nature of the case. [413] **Upon a replevin** the writ of execution is the **writ de retorno habendo,**[2] and if the distress be eloigned the defendant shall have a **capias in withernam;**[3] but on the plaintiff's tendering the damages and submitting to a fine, the process *in withernam* shall be stayed. **In detinue,** after judgment, the plaintiff shall have a **distringas,** to compel the defendant to deliver the goods,

1. Real actions are obsolete.
2. For having a return.
3. See 2 Bouvier Law. Dict. Withernam.

by repeated distresses of his chattels; or else a **scire facias** against any third person in whose hands they may happen to be, to show cause why they should not be delivered. And if the defendant still continues obstinate, then (if the judgment hath been by default or on demurrer) the sheriff shall summon an inquest to ascertain the value of the goods and the plaintiff's damages, which (being either so assessed, or by the verdict in case of an issue) shall be levied on the person or goods of the defendant.

Executions in actions where money only is recovered, as a debt or damages (and not any specific chattel), are of five sorts; either against the body of the defendant or against his goods and chattels, or against his goods and the *profits* of his lands, or against his goods and the *possession* of his lands, or against all three, his body, lands, and goods. [414]

1. The first of these species of execution is by writ of **capias ad satisfaciendum,**[4] which addition distinguishes it from the former *capias ad respondendum,* which lies to compel an appearance at the beginning of a suit. And, properly speaking, this cannot be sued out against any but such as were liable to be taken upon the former *capias.* The intent of it is, to imprison the body of the debtor till satisfaction be made for the debt, costs, and damages; it therefore doth not lie against any privileged persons, peers, or members of parliament, nor against executors or administrators, nor against such other persons as could not be originally held to bail. And Sir Edward Coke also gives us a singular instance, where a defendant in 14 Edw. III. was discharged from a *capias,* because he was of so advanced an age, *quod paenam imprisonamenti subire non protest.*[5] If an action

4. In the states besides writs of possession, the ordinary writs of execution are: (1) The *ca. sa.* or *capias ad respondendum* which issues on a judgment for damages in actions *ex delicto* and in special cases of actions *ex contractu* accompanied by fraud, as has been already explained. As to this writ, see the local statutes and works of Practice. (2) The writ of *fi. fa.* or *fieri facias* is the common writ for enforcing the payment of money judgments; and, as a rule, the statutes authorize the levy on and sale of personal and in default of personal, of real property under this writ. For the proceedings and practice upon such levy and sales, see the local statutes and books on Practice.

5. Because he cannot endure imprisonment.

be brought against an husband and wife for the debt of the wife when sole, and the plaintiff recovers judgment, the *capias* shall issue to take both husband and wife in execution; but if the action was originally brought against herself when sole, and pending the suit she marries, the *capias* shall be awarded against her only, and not against her husband. Yet, if judgment be recovered against an husband and wife for the contract, nay, even for the personal misbehavior of the wife during her coverture, the *capias* shall issue against the husband only.

When a man is once taken in execution upon this writ, no other process can be sued out against his lands or goods. Only by statute 21 Jac. I. c. 24, if the defendant dies while charged in execution upon this writ, the plaintiff may, after his death, sue out a new execution against his lands, goods, or chattels. The writ is directed to the sheriff, commanding him to take the body of the defendant and have him at Westminster on a day therein named, to make the plaintiff satisfaction for his demand. And if he does not then make satisfaction, he must remain in custody till he does. This writ may be sued out, as may all other executory process, for costs against a plaintiff as well as a defendant, when judgment is had against him.

When a defendant is once in custody upon this process, he is to be kept in arcta et salva custodia;[6] and if he be afterwards seen at large, it is an *escape,* and the plaintiff may have an action thereupon against the sheriff for his whole debt. **Escapes are either voluntary or negligent.** Voluntary are such as are by the express consent of the keeper; after which he never can retake his prisoner again (though the plaintiff may retake him at any time), but the sheriff must answer for the debt. Negligent escapes are where the prisoner escapes without his keeper's knowledge or consent, and then upon fresh pursuit the defendant may be retaken, and the sheriff shall be excused if he has him again before any action brought against himself for the escape. [416] A rescue of a prisoner *in execution,* either going to gaol or in goal, or a breach of prison, will not excuse the sheriff

6. In close and safe custody.

from being guilty of and answering for the escape; for he ought to have sufficient force to keep him, since he may command the power of the county.

If a capias ad satisfaciendum is sued out, and a non est inventus is returned thereon, the plaintiff may sue out a process against the bail, if any were given; who stipulated in this triple alternative, that the defendant should, if condemned in the suit, satisfy the plaintiff his debt and costs, or that he should surrender himself a prisoner, or that they would pay it for him. As therefore the two former branches of the alternative are neither of them complied with, the latter must immediately take place. In order to which **a writ of scire facias** may be sued out against the bail, commanding them to show cause why the plaintiff should not have execution against them for his debt and damages; and on such writ, if they show no sufficient cause, or the defendant does not surrender himself on the day of the return, or of showing cause (for afterwards is not sufficient), the plaintiff may have judgment against the bail and take out a writ of *capias ad satisfaciendum*,[7] or other process of execution against them. [417]

2. **The next species of execution is against the goods and chattels** of the defendant, and is called a **writ of fieri facias,** from the words in it where the sheriff is commanded, *quod fieri facias de bonis*,[8] that he cause to be made of the goods and chattels of the defendant the sum or debt recovered. This lies as well against privileged persons, peers, &c., as other common persons, and against executors or administrators with regard to the goods of the deceased. The sheriff may not break open any outer doors to execute either this or the former writ, but must enter peaceably, and may then break open any inner door belonging to the defendant, in order to take the goods. And he may sell the goods and chattels (even an estate for years, which is the chattel real) of the defendant till he has raised enough to satisfy the judgment and costs; first paying the landlord of the premises upon which the goods are found the arrears of rent

7. Capias for satisfaction [of the judgment].

8. That he make of the goods. See note above.

then due, not exceeding one year's rent in the whole. If part only of the debt be levied on a *fieri facias*, the plaintiff may have a *capias ad satisfaciendum* for the residue.

3. **A third species of execution is by writ of levari facias** [obsolete], which affects a man's goods and the *profits* of his lands, by commanding the sheriff to levy the plaintiff's debt on the lands and goods of the defendant; whereby the sheriff may seize all his goods, and receive the rents and profits of his lands till satisfaction be made to the plaintiff. Little use is now made of this writ, the remedy by *elegit*, which takes possession of the lands themselves, being much more effectual. [418]

4. **The fourth species of execution is by the writ of elegit,**[9] which is a judicial writ given by the statute Westm. 2, 13 Edw. I. c. 18, either upon a judgment for a debt or damages, or upon the forfeiture of a recognizance taken in the king's court. By the common law a man could only have satisfaction of goods, chattels, and the present profits of lands, by the two last mentioned writs of *fieri facias* or *levari facias;* but not the possession of the lands themselves, which was a natural consequence of the feodal principles, which prohibited the alienation, and of course the incumbering, of the fief with the debts of the owner. And when the restriction of alienation began to wear away, the consequence still continued, and no creditor could take the possession of lands, but only levy the growing profits, so that if the defendant aliened his lands, the plaintiff was ousted of his remedy. The statute therefore granted this writ (called an *elegit*, because it is in the choice or election of the plaintiff whether he will sue out this writ or one of the former), by which the defendant's goods and chattels are not sold, but only appraised; and all of them (except oxen and beasts of the plough) are delivered to the plaintiff, at such reasonable appraisement and price, in part of satisfaction of his debt. If the goods are not sufficient, then the moiety or one half of his freehold lands, which he had at the time of the judgment given, whether held in his own name or by any other trust for him, are also to be delivered to the plaintiff to hold, till out of the rents and profits thereof the debt be levied, or till the defendant's interest be expired. [419] During this period the plaintiff is called tenant by *elegit*. This execution, or seizing of lands by *elegit*, is of so high a nature that after it the body of the defendant cannot be taken. But if execution can only be had of the goods, because there are no lands, and such goods are not sufficient to pay the debt, a *capias ad satisfaciendum* may then be had after the *elegit;* for such *elegit* is in this case no more in effect than a *fieri facias*. So that body and goods may be taken in execution, or land and goods, but not body and land too, upon any judgment

9. Not in general use in the United States, though possibly it may still be found to exist in one or two states.

between subject and subject in the course of the common law. [420] But,

5. **Upon some prosecutions given by statute,** as in the case of recognizances or debts acknowledged on **statutes merchant or statutes staple**[1] (pursuant to the statutes 13 Edw. I. *de mercatoribus,* and 27 Edw. III. c. 9), upon forfeiture of these the body, lands, and goods may all be taken at once in execution to compel the payment of the debt. The process hereon is usually called **an extent,** or *extendi facias,* because the sheriff is to cause the lands, etc., to be appraised to their full extended value before he delivers them to the plaintiff, that it may be certainly known how soon the debt will be satisfied.

Judgment between subject and subject related, even at common law, no farther back than the first day of the term in which they were recovered,[2] in respect of the lands of the debtor, and did not bind his goods and chattels but from the date of the writ of execution; and now by the statute of frauds, 29 Car. II. c. 3, the judgment shall not bind the land in the hands of a *bona fide* purchaser, but only from the day of actually signing the same, which is directed by the statute to be punctually entered on the record; nor shall the writ of execution bind the goods in the hands of a stranger or the purchaser, but only from the actual delivery of the writ to the sheriff or other officer, who is therefore ordered to endorse on the back of it the day of his receiving the same. [421]

These are the methods which the law of England has pointed out for the execution of judgments; and **when the plaintiff's demand is satisfied,** either by the voluntary payment of the defendant or by this compulsory process, or otherwise, **satisfaction ought to be entered on the record,** that the defendant may not be liable to be hereafter harassed a second time on the same account. **But all these writs of execution must be sued out within a year and a day** after the judgment is entered, otherwise the court concludes *prima facie* that the judgment is satisfied and ex-

1. Not in use in this country.

2. The reason for this relation was that originally the term of court was only one day. When not changed by statute it is probably still the rule that a judgment relates back to the first day of term, but the student should consult the statutes upon the subject.

tinct; yet, however, it will grant a writ of scire facias in pursuance of statute Westm. 2, 13 Edw. I. c. 45, for the defendant to show cause why the judgment should not be revived and execution had against him, to which the defendant may plead such matter as he has to allege, in order to show why process of execution should not be issued; or the plaintiff may still bring an action of debt, founded on this dormant judgment, which was the only method of revival allowed by the common law.[3]

3. Still the law where not changed by statute.

CHAPTER XXVII.

OF PROCEEDINGS IN THE COURTS OF EQUITY.

The same jurisdiction is exercised and the same system of redress pursued in the Equity Court of the Exchequer as in the Court of Chancery; with a distinction, however, as to some few matters peculiar to each tribunal and in which the other cannot interfere. [426] And **as to those peculiar to the Chancery: —**

1. **Upon the abolition of the Court of Wards** the care which the crown was bound to take as guardian of its infant tenants was totally extinguished in every feodal view, but resulted to the king in his Court of Chancery together with the general protection of all other *infants* in the kingdom. [427] **When, therefore, a fatherless child has no other guardian, the Court of Chancery has a right to appoint one.**[1] In this and from all proceedings relative thereto an appeal lies to the House of Lords. **The Court of Exchequer can only appoint a guardian ad litem** to manage the defence of the infant if a suit be commenced against him,— a power which is incident to the jurisdiction of every court of justice; but when the interest of a minor comes before the court judicially in the progress of a cause, or upon a bill for that purpose filed, either tribunal indiscriminately will take care of the property of the infant.

2. **As to idiots and lunatics,** the king himself used formerly to commit the custody of them to proper committees in every particular case; but now, to avoid solicitations and the very shadow of undue partiality, a warrant is issued by the king under his royal sign manual to the Chancellor or Keeper of his Seal to perform this office for him; and if he acts improperly in granting such custodies, the complaint must be made to the king himself in council.[2] But the previous proceedings on the commission, to inquire whether or no the party be an idiot or a lunatic, are on the law side of the Court of Chancery, and can only be redressed (if erroneous) by writ of error in the regular course of law.

3. **The king, as parens patriae, has the general superintendence of all charities,** which he exercises by the keeper of his conscience, the Chancellor. And therefore whenever it is necessary the Attorney-General, at the relation of some informant (who is usually called the *relator*), files *ex officio* an information in the Court of Chancery to have the charity prop-

1. In this country this jurisdiction is usually by statute conferred upon probate courts, or other courts of similar jurisdiction.

2. In the United States this jurisdiction is usually exercised by courts of probate or other courts of similar jurisdiction.

erly established. By statute also 43 Eliz. c. 4, authority is given to the Lord Chancellor or Lord Keeper and to the Chancellor of the Duchy of Lancaster, respectively, to grant commissions under their several seals to inquire into any abuses of charitable donations and rectify the same by decree, which may be reviewed in the respective courts of the several chancellors upon exceptions taken thereto. [428]

4. **By the several statutes relating to bankrupts** a summary jurisdiction is given to the Chancellor in many matters consequential or previous to the commissions thereby directed to be issued.

Let us next take a brief but comprehensive view of **the general nature of equity** as now understood and practised in our several courts of judicature. [429]

Equity, then, in its true and genuine meaning, is the soul and spirit of all law; *positive* law is construed, and *rational* law is made by it. In this, equity is synonymous to justice; in that, to the true sense and sound interpretation of the rule. **But the very terms of a court of equity and a court of law, as contrasted to each other,** are apt to confound and mislead us; as if the one judged without equity, and the other was not bound by any law. Whereas every definition or illustration to be met with which now draws a line between the two jurisdictions, by setting law and equity in opposition to each other, will be found either totally erroneous or erroneous to a certain degree. [430]

1. Thus in the first place it is said that it is the business of a court of equity in England to **abate the rigor of the common law.** But no such power is contended for. In all cases of positive law the courts of equity, as well as the courts of law, must say with Ulpian, "*hoc quidem perquam durum est, sed ita lex scripta est.*"[3]

2. It is said that a court of equity determines according to **the spirit of the rule,** and not according to the strictness of the letter. But so also does a court of law. Both, for instance, are equally bound, and equally profess, to interpret statutes according to the true intent of the legislature. There is not a single rule of interpreting laws, whether equitably or strictly, that is not equally used by

3. This indeed is very hard, but so the law is written.

the judges in the courts both of law and equity, the construction must in both be the same; or, if they differ, it is only as one court of law may also happen to differ from another. [431] Each endeavors to fix and adopt the true sense of the law in question; neither can enlarge, diminish, or alter that sense in a single title.

3. Again, it hath been said that **fraud, accident, and trust** are the proper and peculiar objects of a court of equity. But every kind of **fraud** is equally cognizable and equally adverted to in a court of law, and some frauds are cognizable only there: as fraud in obtaining a devise of lands, which is always sent out of the equity courts, to be there determined. Many **accidents** are also supplied in a court of law, as loss of deeds, mistakes in receipts or accounts, wrong payments, deaths which make it impossible to perform a condition literally, and a multitude of other contingencies; and many cannot be relieved even in a court of equity, as if by accident a recovery is ill suffered, a devise ill executed, a contingent remainder destroyed, or a power of leasing omitted in a family settlement. A technical **trust**, indeed, created by the limitation of a second use, was forced into the courts of equity in the manner formerly mentioned; and this species of trust, extended by inference and construction, has ever since remained as a kind of *peculium* in those courts. [432] But there are other trusts, which are cognizable in a court of law, as deposits and all manner of bailments, and especially that implied contract, so highly beneficial and useful, of having undertaken to account for money received to another's use, which is the ground of an action on the case almost as universally remedial as a bill in equity.

4. Once more: it has been said that a court of equity is not **bound by rules or precedents**, but acts from the opinion of the judge, founded on the circumstances of every particular case; whereas the system of our courts of equity is a labored, connected system, governed by established rules, and bound down by precedents from which they do not depart, although the reason of some of them may perhaps be liable to objection. Thus the refusing a wife her dower

in a trust-estate, yet allowing the husband his courtesy; the holding the penalty of a bond to be merely a security for the debt and interest, yet considering it sometimes as the debt itself, so that the interest shall not exceed that penalty; the distinguishing between a mortgage at *five per cent.*, with a clause of a reduction to *four* if the interest be regularly paid, and the mortgage at *four per cent.* with a clause of enlargement to *five* if the payment of the interest be deferred, so that the former shall be deemed a conscientious, the latter an unrighteous bargain, — all these and other cases that might be instanced, are plainly rules of positive law, supported only by the reverence that is shown, and generally very properly shown, to a series of former determinations, that the rule of property may be uniform and steady. [433] Nay, sometimes a **precedent** is so strictly followed that a particular judgment, founded upon special circumstances, gives rise to a general rule.

In short, if a court of equity in England did really act as many ingenious writers have supposed it (from theory) to do, it would rise above all law, either common or statute, and be a most arbitrary legislator in every particular case.

The suggestion of every bill, to give jurisdiction to the courts of equity (copied from those early times), **is that the complainant hath no remedy at the common law.** [434] But he who should from thence conclude that no case is judged of in equity where there might have been relief at law, and at the same time casts his eye on the extent and variety of the cases in our equity reports, must think the law a dead letter indeed. **The rules of property, rules of evidence, and rules of interpretation in both courts are, or should be, exactly the same. Formerly some causes,** which now no longer exist, might occasion a different rule to be followed in one court from what was afterwards adopted in the other, as founded in the nature and reason of the thing [*e. g.*, the cases of penal bonds to secure payment of principal and interest, and mortgages].

Again, **neither a court of equity nor of law can vary men's wills or agreements,** or, in other words, make wills or agreements for them. [435] Both are to understand them truly,

and therefore both of them uniformly. A court of equity no more than a court of law can relieve against a penalty in the nature of stated damages, as a rent of 5*l.* an acre for ploughing up ancient meadow; nor against a lapse of time, where the time is material to the contract, as in covenants for renewal of leases. Both courts will equitably construe, but neither pretends to control or change, a lawful stipulation or engagement.

The rules of decision are in both courts equally apposite to the subjects of which they take cognizance. [436] Where the subject-matter is such as requires to be determined *secundum aequum et bonum,*[4] as generally upon actions on the case, the judgments of the courts of law are guided by the most liberal equity. In matters of positive right both courts must submit to and follow those ancient and invariable maxims "*quae relicta sunt et tradita.*"[5] Both follow the law of nations, and collect it from history and the most approved authors of all countries where the question is the object of that law. In mercantile transactions they follow the marine law, and argue from the usages and authorities received in all maritime countries. Where they exercise a concurrent jurisdiction, they both follow the law of the proper *forum;* in matters originally of ecclesiastical cognizance, they both equally adopt the canon or imperial law, according to the nature of the subject; and if a question came before either which was properly the object of a foreign municipal law, they would both receive information what is the rule of the country, and would both decide accordingly.

Such, then, being the parity of law and reason which governs both species of courts, **wherein does their essential difference consist?** It principally consists in the **different modes of administering justice** in each — in the **mode of proof,** the **mode of trial,** and the **mode of relief.** Upon these, and upon two other accidental grounds of jurisdiction, which were formerly driven into those courts by narrow decisions of the courts of law, viz., **the true construction of securities for money lent,** and **the form and**

4. According to right and justice. 5. Which are left and handed down.

effect of a trust or second use, — upon these main pillars hath been gradually erected that structure of jurisprudence which prevails in our courts of equity. [437]

1. **And first, as to the mode of proof.** When facts, or their leading circumstances, rest only in the knowledge of the party, a court of equity applies itself to his conscience, and purges him upon oath with regard to the truth of the transaction;[6] and that being once discovered, the judgment is the same in equity as it would have been at law. **But for want of this discovery at law** the courts of equity have acquired a concurrent jurisdiction with every other court in all **matters of account.**[7] As incident to accounts, they take a concurrent cognizance of the administration of personal assets, consequently of debts, legacies, the distribution of the residue, and the conduct of executors and administrators. As incident to accounts, they also take the concurrent jurisdiction of tithes and all questions relating thereto, of all dealings in partnership, and many other mercantile transactions; and so of bailiffs, receivers, factors, and agents. It would be endless to point out all the several avenues in human affairs and in this commercial age which lead to or end in accounts.

From the same fruitful source, the compulsive discovery upon oath, the courts of equity have acquired a jurisdiction over almost all matters of fraud, all matters in the private knowledge of the party, which, though concealed, are binding in conscience, and all judgments at law obtained through such fraud or concealment; and this, not by impeaching or reversing the judgment itself, but by prohibiting the plaintiff from taking any advantage of a judgment obtained by suppressing the truth, and which, had the same facts appeared on the trial as now are discovered, he would never have attained at all. [438]

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6. In those states in which courts of equity still exist, the complainant may still require an answer under oath as described in the text, but if answer on oath is expressly waived the bill and answer are merely pleadings. 1 Barbour Chancery Prac. (N. Y.) 143 (this work is especially adapted to the chancery practice of Michigan); Puterburgh's Chancery Pleading & Practice (4th Ed.), 167.

7. As before stated the common law action of account is still in use in Illinois.

2. **As to the mode of trial.** This is by interrogatories administered to the witnesses, upon which their depositions are taken in writing wherever they happen to reside. If, therefore, the cause arises in a foreign country, and the witnesses reside upon the spot; if, in causes arising in England, the witnesses are abroad, or shortly to leave the kingdom; or if witnesses residing at home are aged or infirm,— any of these cases lays a ground for a court of equity to grant a commission to examine them.[8]

3. **With respect to the mode of relief.** The want of a more specific remedy than can be obtained in the courts of law gives a concurrent jurisdiction to a court of equity in a great variety of cases. To instance in executory agreements. A court of equity will compel them to be carried into strict execution, unless where it is improper or impossible, instead of giving damages for their non-performance. And hence a fiction is established, that **what ought to be done shall be considered as being actually done**, and shall relate back to the time when it ought to have been done originally; and this fiction is so closely pursued through all its consequences that it necessarily branches out into many rules of jurisprudence, which form a certain regular system. So of waste and other similar injuries, a court of equity takes a concurrent cognizance, in order to prevent them by injunction. Over questions that may be tried at law in a great multiplicity of actions, a court of equity assumes a jurisdiction to prevent the expense and vexation of endless litigations and suits. In various kinds of frauds it assumes a concurrent jurisdiction, not only for the sake of a discovery, but of a more extensive and specific relief, as by setting aside fraudulent deeds, decreeing re-conveyances, or directing an absolute conveyance merely to stand as a security. [439] And thus, lastly, for the sake of a more beneficial and complete relief by decreeing a sale of lands, a court of equity holds plea of all debts, incumbrances, and charges that may affect it or issue thereout.[9]

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8. Commissions to take testimony in such cases may now, by statute, be issued and the testimony of the witnesses taken thereunder in courts of law. Consult the statutes.

9. Courts of law, as a rule in ordi-

4. **The true construction of securities** for money lent is another fountain of jurisdiction in courts of equity. When they held the penalty of a bond to be the form, and that in substance it was only as a pledge to secure the repayment of the sum *bona fide* advanced, with a proper compensation for the use, they laid the foundation of a regular series of determinations, which have settled the doctrine of personal pledges or securities, and are equally applicable to mortgages of real property. The mortgagor continues owner of the land, the mortgagee of the money lent upon it. But this ownership is mutually transferred, and the mortgagor is barred from redemption, if, when called upon by the mortgagee, he does not redeem within a time limited by the court; or he may, when out of possession, be barred by length of time, by analogy to the statute of limitations.

5. **The form of a trust, or second use,** gives the courts of equity an exclusive jurisdiction as to the subject-matter of all settlements and devises in that form, and of all the long terms created in the present complicated mode of conveyancing. This is a very ample source of jurisdiction; but the trust is governed by very nearly the same rules as would govern the estate in a court of law if no trustee was interposed; and by a regular positive system established in the courts of equity, the doctrine of trusts is now reduced to as great a certainty as that of legal estates in the courts of the common law. [440]

These are the principal (for I omit the minuter) grounds of the jurisdiction at present exercised in our courts of equity.

The first commencement of a suit in Chancery is by preferring a bill to the Lord Chancellor in the style of a petition, "humbly complaining showeth to your lordship your orator, A B, that," &c. [442] **This is in the nature of a declaration** at common law, or a libel and allegation in the spiritual courts, setting forth the circumstances of the case at length, as some fraud, trust, or hardship, "in tender

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nary actions, administer relief by the award of damages. Courts of equity, on the other hand, in cases in which they have jurisdiction, compel the defendant to do what in equity and good conscience he ought to do; if damages are awarded they are, as a rule, ancillary to other relief.

consideration whereof" (which is the usual language of the bill), "and for that your orator is wholly without remedy at the common law," relief is therefore prayed at the Chancellor's hands, and also process of *subpoena* against the defendant, to compel him to answer upon oath to all the matter charged in the bill. And if it be to quiet the possession of lands, to stay waste, or to stop proceedings at law, an injunction is also prayed in the nature of an *interdictum* by the civil law, commanding the defendant to cease.[1]

This bill must call all necessary parties, however remotely concerned in interest, before the court, otherwise no decree can be made to bind them,[2] **and must be signed by counsel** as a certificate of its decency and propriety, for it must not contain matter either scandalous or impertinent;[3] if it does, the defendant may refuse to answer it till such scandal or impertinence is expunged, which is done upon an order to refer it to one of the officers of the court called a Master in Chancery,[4] of whom there are in number twelve, including the Master of the Rolls. The master is to examine the propriety of the bill, and if he reports it scandalous or impertinent, such matter must be struck out, and the defendant shall have his costs, which ought of right to be paid by the counsel who signed the bill. [443]

When the bill is filed in the office of the six clerks **if an injunction be prayed** therein, it may be had at various stages of the cause, according to the circumstances of the

1. In the federal courts and in the courts of chancery in those states where separate courts of equity exist, substantially the same forms as those in the text are still preserved. See, generally, Puterburgh's Chancery Plead. & Prac. (4th Ed.); Barbour's Chancery Practice, vol. 2; Daniel's Chancery Pleading & Practice; Hughe's Federal Procedure, 223, 424.

In many of the states the distinction in form between equity and common law has been abolished; but the essential nature of the relief administered remain and must ever remain the same whether in one or two forums.

On Nov. 4, 1912, new federal equity rules were promulgated by the United States Supreme Court to become effective Feb. 1, 1913. As to the operation of these rules, see an article by Wallace R. Lane in Harvard Law Review, republished in Chicago Legal News for Sept. 19, 1914, Vol. 47, No. 7, p. 52, 54, 55.

2. See Hughes, Fed. Proc. 424.

3. Hughes, Fed. Prac., 424; 1 Barb. Ch. Prac. 43.

4. This office is still preserved in Illinois, Michigan and other jurisdictions retaining chancery courts.

case.[5] If the bill be to stay execution upon an oppressive judgment, and the defendant does not put in his answer within the stated time allowed by the rules of the court, an injunction will issue of course, and, when the answer comes in, the injunction can only be continued upon a sufficient ground appearing from the answer itself. But if an injunction be wanted to stay waste, or other injuries of an equally urgent nature, then upon the filing of the bill, and a proper case supported by *affidavits,* the court will grant an injunction immediately to continue till the defendant has put in his answer, and till the court shall make some further order concerning it; and when the answer comes in, whether it shall then be dissolved or continued till the hearing of the cause, is determined by the court upon argument, drawn from considering the answer and affidavit together.

But, upon common bills, as soon as they are filed, process of subpoena[6] **is taken out,** which is a writ commanding the defendant to appear and answer to the bill, on pain of 100*l.* **If the defendant, on service of the subpoena, does not appear** within the time limited by the rules of the court, and plead, demur, or answer to the bill, he is then said to be in *contempt;* and the respective processes of contempt are in successive order awarded against him. [Which are, in order, an **attachment** in the nature of a *capias,* an **attachment with proclamations, a commission of rebellion, sending the serjeant at arms** in quest of him, and lastly **sequestration.**] **After an order for a sequestration issued, the plaintiff's bill is to be taken pro confesso,**[7] and a decree to be made accordingly. So that the sequestration does not

5. As to who may authorize the issuance of an injunction, see local statutes and works on Practice.

6. Where equity jurisprudence is administered in this country in separate courts of chancery or on the chancery side of a common law court, as in Michigan, Illinois, New Jersey and Tennessee, the United States courts and perhaps others, a subpœna or chancery summons following the filing of a bill is the regular process. In those states practicing under a code of procedure, the same method prevails both in law and equity cases, though differing in different states. See *ante,* note, and the local works on Practice.

7. As confessed. Unless discovery under oath is required, on default of answer within the time prescribed, the bill will be taken *pro confesso* without further process.

seem to be in the nature of process to bring in the defendant, but only intended to enforce the performance of the decree. Thus much if the defendant absconds.

If the defendant is taken upon any of this process, he is to be committed to the Fleet or other prison, till he puts in his appearance or answer, or performs whatever else this process is issued to enforce, and also clears his contempts by paying the costs which the plaintiff has incurred thereby. [445] For the same kind of process is issued out in all sorts of contempts during the progress of the cause, if the parties in any point refuse or neglect to obey the order of the court.

The process against a body corporate is by distringas, to distrain them by their goods and chattels, rents and profits, till they shall obey the summons or directions of the court.

The ordinary process before mentioned cannot be sued out till after the service of the *subpoena,* for then the contempt begins, otherwise he is not presumed to have notice of the bill; and therefore by absconding to avoid the *subpoena* a defendant might have eluded justice, till the statute 5 Geo. II. c. 25, which enacts that, **where the defendant cannot be found to be served with process of subpoena,** and absconds (as is believed) to avoid being served therewith, a day shall be appointed him to appear to the bill of the plaintiff, which is to be inserted in the London Gazette, read in the parish church where the defendant last lived, and fixed up at the Royal Exchange, and, if the defendant doth not appear upon that day, the bill shall be taken *pro confesso.*[8]

But if the defendant appears regularly and takes a copy of the bill, he is next to demur, plead, or answer.

A demurrer in equity is nearly of the same nature as a demurrer in law, being an appeal to the judgment of the court whether the defendant shall be bound to answer the plaintiff's bill, as, for want of sufficient matter of equity

8. In all the states substituted service by publication, etc., will be found to have been established by statute.

therein contained, or where the plaintiff, upon his own showing, appears to have no right, or where the bill seeks a discovery of a thing which may cause a forfeiture of any kind, or may convict a man of any criminal misbehavior. [446] For any of these causes a defendant may demur to the bill. And if, on demurrer, the defendant prevails, the plaintiff's bill shall be dismissed; if the demurrer be overruled, the defendant is ordered to answer.[9]

A plea may be either to the *jurisdiction*, showing that the court has no cognizance of the cause, or to the *person*, showing some disability in the plaintiff, as by outlawry, excommunication, and the like; or it is in *bar*, showing some matter wherefore the plaintiff can demand no relief, as an act of parliament, a fine, a release, or a former decree. And the truth of this plea the defendant is bound to prove if put upon it by the plaintiff.[1] But as bills are often of a complicated nature and contain various matter, **a man may plead as to part, demur as to part, and answer to the residue. But no exceptions to formal minutiae in the pleadings will be here allowed**, for the parties are at liberty, on the discovery of any errors in form, to amend them.[2]

An answer is the most usual defence that is made to a plaintiff's bill. It is given in upon oath,[3] or the honor of a peer or peeress; but where there are amicable defendants, their answer is usually taken without oath by consent of the plaintiff. Yet if in the bill any question be put that tends to the discovery of any crime, the defendant may thereupon demur, as was before observed, and may refuse to answer. [447]

An answer must be [sworn to, unless an answer on oath is waived, **and must be] signed by counsel, and must either deny or confess** all the material parts of the bill; **or it may**

9. See, as to demurrer, 1 Barbour's Chanc. Prac. 105. In some jurisdictions a motion to dismiss the bill for want of equity takes the place of a demurrer.

1. See 1 Barbour's Chanc. Prac. 114.

2. This is the regular way of getting new facts in the bill, as in chancery there are no special replications setting up new matter.

3. When answer under oath is not waived, as is usually the case.

confess and avoid, that is, justify or palliate the facts.[4] [448] If one of these is not done, the answer may be excepted to for insufficiency, and the defendant be compelled to put in a more sufficient answer. A defendant cannot pray anything in this his answer but to be dismissed the court; if he has any relief to pray against the plaintiff, he must do it by an original bill of his own, which is called a **cross-bill.**[5]

After answer put in, the plaintiff upon payment of costs may amend his bill, either by adding new parties or new matter, or both, upon the new lights given him by the defendant; and the defendant is obliged to answer afresh to such amended bill.[6] But this must be before the plaintiff has replied to the defendant's answer, whereby the cause is at issue; for afterwards, if new matter arises which did not exist before he must set it forth by a **supplemental-bill.**[7] There may be also a **bill of revivor**[8] when the suit is abated by the death of any of the parties, in order to set the proceedings again in motion, without which they remain at a stand. And there is likewise **a bill of interpleader,**[9] where a person who owes a debt or rent to one of the parties in suit, but, till the determination of it, he knows not to which, desires that they may interplead, that he may be safe in the payment. In this last case it is usual to order the money to be paid into court for the benefit of such of the parties to whom upon hearing the court shall decree it to be due. But this depends upon circumstances, and the plaintiff must also annex an *affidavit* to his bill, swearing that he does not collude with either of the parties.

If the plaintiff finds sufficient matter confessed in the defendant's answer to ground a decree upon, he may pro-

4. See, generally, as to defence by answer, 1 Barb. Ch. Pr. 130; Puterburgh's Chan. Pl. & Pr. (4th Ed.) 158.

5. The cross-bill is, however, filed in the same court and cause. See, generally, as to the nature, purposes of and proceedings upon, 2 Barbour's Chanc. Prac. ch. 9; Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 24.

6. See 1 Barb. Chanc. Pr. 113, 119, 172, 210, 219; Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 9.

7. See 1 Barb. Ch. Pr. 362.

8. See Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 17.

9. See Id., ch. 22.

ceed to the hearing of the cause upon bill and answer only. But in that case he must take the defendant's answer to be true in every point.[1] **Otherwise the course is for the plaintiff to reply generally** to the answer, averring his bill to be true, certain, and sufficient, and the defendant's answer to be directly the reverse, which he is ready to prove as the court shall award,[2] upon which the defendant rejoins, averring the like on his side, which is joining issue upon the facts in dispute.[3] [449] **To prove which facts** is the next concern.

This is done by examination of witnesses and taking their **depositions** in writing, according to the manner of the civil law.[4] And for that purpose *interrogatories* are framed, or questions in writing, which, and which only, are to be proposed to and asked of the witnesses in the cause. These interrogatories must be short and pertinent, not leading ones: as, "Did not you see this?" or "Did not you hear that?" for if they be such, the depositions taken thereon will be suppressed and not suffered to be read. For the purpose of examining witnesses in or near London there is an examiner's office appointed; but for such as live in the country a **commission to examine witnessess** is usually granted to four commissioners, two named of each side, or any three or two of them, to take the depositions there. And if the witnesses reside beyond sea, a commission may be had to examine them there upon their own oaths, and (if foreigners) upon the oaths of skilful interpreters. And it hath been established that the deposition of an heathen who

1. 1 Barb. Ch. Pr. 318.

2. Id., ch. 9.

3. We do not understand that a rejoinder is either necessary or usual in the United States. The cause is at view as soon as the replication is filed. Puterburgh's Ch. Pl. & Pr. (4th Ed.), 210; Barb. Ch. Pr. 249; 2 Daniel's Ch. Pl. & Pr. (3d Am. Ed.), 828, note; Story's Eq. Pl., § 879, note.

4. In the United States testimony in chancery cases is usually taken by deposition before a master, or other officer, upon a *viva voce* examination and cross-examination by counsel. If the witnesses cannot be produced before the master, the statutes authorize the taking of their depositions by *dedimus potestatem*, or commission, to take testimony upon interrogatories and cross-interrogatories or *viva voce*, as counsel may elect. This is the general method. For details, consult the local statutes and books on Practice. See Puterburgh's Ch. Pl. & Pr. (4th Ed.), 221-225.

believes in the Supreme Being, taken by commission in the most solemn manner according to the custom of his own country, may be read in evidence.[5]

The commissioners are sworn to take the examinations truly and without partiality, and not to divulge them till published in the Court of Chancery, and their clerks are also sworn to secrecy. The witnesses are compellable by process of *subpoena,* as in the courts of common law, to appear and submit to examination. And when their depositions are taken they are transmitted to the court with the same care that the answer of a defendant is sent.

If witnesses to a disputable fact are old and infirm, it is very usual to file a bill to perpetuate the testimony of those witnesses although no suit is depending, for, it may be, a man's antagonist only waits for the death of some of them to begin his suit.[6] [450]

When all the witnesses are examined, then, and not before, the depositions may be published, by a rule to pass publication, after which they are open for the inspection of all the parties, and copies may be taken of them. The cause is then ripe to be set down for hearing,[7] which may be done at the procurement of the plaintiff or defendant before either the Lord Chancellor or the Master of the Rolls, according to the discretion of the clerk in court, regulated by the nature and importance of the suit and the arrear of causes depending before each of them respectively. **Concerning the authority of the Master of the Rolls** to hear and determine causes, and his general power in the Court of Chancery, it was declared by statute 3 Geo. II. c. 30, that all orders and decrees by him made, except such as by the course of the court were appropriated to the Great Seal alone, should be deemed to be valid; subject, nevertheless, to be discharged or altered by the Lord Chancellor, and so as they shall not be enrolled till the same are signed by his

5. Omichund v. Barker, Willes, 538; 1 Smith's Lead. Cas. *535.

6. See Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 23.

7. An order closing the taking of testimony is entered here before the cause is set down for hearing.

lordship.[8] **Either party may be subpoenaed to hear judgment**[9] on the day so fixed for the hearing, and then, if the plaintiff does not attend, his bill is dismissed with costs, or, if the defendant makes default, a decree will be made against him which will be final, unless he pays the plaintiff's cost of attendance and shows good cause to the contrary on a day appointed by the court. [451] A plaintiff's bill may also at any time be dismissed for want of prosecution, which is in the nature of a nonsuit at law, if he suffers three terms to elapse without moving forward in the cause.

When there are cross causes on a cross-bill filed by the defendant against the plaintiff in the original cause, they are generally contrived to be brought on together, that the same hearing and the same decree may serve for both of them.[1] **The method of hearing causes in court** is usually this. The parties on both sides appearing by their counsel, the plaintiff's bill is first opened or briefly abridged, and the defendant's answer also, by the junior counsel on each side; after which the plaintiff's leading counsel states the case and the matters in issue, and the points of equity arising therefrom; and then such depositions as are called for by the plaintiff are read by one of the six clerks,[2] and the plaintiff may also read such part of the defendant's answer as he thinks material or convenient; and after this the rest of the counsel for the plaintiff make their observations and arguments. Then the defendant's counsel go through the same process for him, except that they may not read any part of his answer [*quaere,* when answer on oath is not waived and the answer is responsive to the bill]; and the counsel for the plaintiff are heard in reply. When all are heard, the court[3] pronounces the *decree,* adjusting every point in debate according to equity and good conscience, which decree being usually very long, the minutes

8. See the Supreme Court of Judicature Act for changes in English system.

9. Not the practice in this country. The manner of bringing a cause to hearing varies in the different states. See local works on Practice.

1 This is still the practice.

2. By counsel here.

3. Usually the court will take the cause under advisement and pronounce the decree later.

of it are taken down and read openly in court by the registrar. **The matter of costs**[4] to be given to either party is not here held to be a point of right, but merely discretionary (by the statute 17 Ric. II. c. 6), according to the circumstances of the case as they appear more or less favorable to the party vanquished. And yet the statute 15 Hen. VI. c. 4, seems expressly to direct that as well damages as costs shall be given to the defendant, if wrongfully vexed in this court. [452]

The Chancellor's decree is either interlocutory or final. It very seldom happens that the first decree can be final, or conclude the cause; for if any matter of fact is strongly controverted, this court is so sensible of the deficiency of trial by written depositions that it will not bind the parties thereby, but usually directs the matter to be tried by jury;[5] especially such important facts as the validity of a will, or whether A is the heir-at-law to B, or the existence of a *modus decimandi*,[6] or real and immemorial composition for tithes. But as no jury can be summoned to attend this court, the fact is usually directed to be tried at the bar of the Court of King's Bench or at the assises upon a **feigned issue.** For (in order to bring it there, and have the point in dispute, and that only, put in issue), an action is brought wherein the plaintiff by a fiction declares that he laid a wager of 5*l.* with the defendant that A was heir at law to B, and then avers that he is so, and therefore demands the 5*l.* The defendant admits the feigned wager, but avers that A is not the heir to B; and thereupon that issue is joined, which is directed out of Chancery to be tried, and thus the verdict of the jurors at law determines the fact in the court of equity.[7]

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4. Consult local statutes and books on practice.

5. The court may, in this country, direct an issue to be tried by a jury; but it is not a very common practice. In some states, however, the statutes authorize the trial of certain cases in chancery before a jury, especially will cases.

6. Method of tithing.

7. The manner of framing the issue depends upon the statutes. Regularly a verdict on a feigned issue is merely advisory and to inform the chancellor's conscience. By statute in some cases its effect may be binding. Consult the local statutes.

So likewise, if a question of mere law arises in the course of a cause, as whether by the words of a will an estate for life or in tail is created, or whether a future interest devised by a testator shall operate as a remainder or an executory devise, it is the practice of this court to refer it to the opinion of the judges of the Court of King's Bench or Common Pleas upon a case stated for that purpose, wherein all the material facts are admitted and the point of law is submitted to their decision, who thereupon hear it solemnly argued by counsel on both sides and certify their opinion to the Chancellor. [453] And upon such certificate the decree is usually founded.[8]

Another thing also retards the completion of decrees. **Frequently long accounts are to be settled,** incumbrances and debts to be inquired into, and a hundred little facts to be cleared up, before a decree can do full and sufficient justice. These matters are always by the decree on the first hearing **referred to a master in Chancery** to examine, which examinations frequently last for years; and then he is to report the fact, as it appears to him, to the court. This report may be excepted to, disproved, and overruled, or otherwise is confirmed and made absolute by order of the court.[9]

When all issues are tried and settled, and all references to the master ended, the cause is again brought to hearing upon the matters of equity reserved, and a final decree is made, the performance of which is enforced (if necessary) by commitment of the person or sequestration of the party's estate. And if by this decree either party thinks himself aggrieved he may petition the Chancellor for a **rehearing,** whether it was heard before his lordship or any of the judges sitting for him, or before the Master of the Rolls. For whoever may have heard the cause, it is the Chancellor's decree, and must be signed by him before it is enrolled, which is done of course unless a rehearing be desired. Every petition for a rehearing must be signed by two counsel of character, usually such as have been concerned

8. With us the trial court decides all questions of law.

9. The same practice prevails here.

in the cause, certifying that they apprehend the cause is proper to be reheard. And upon the rehearing all the evidence taken in the cause, whether read before or not, is now admitted to be read, because it is the decree of the Chancellor himself, who only now sits to hear reasons why it should not be enrolled and perfected, at which time all omissions of either evidence or argument may be supplied. [454] But after the decree is once signed and enrolled it cannot be reheard or rectified but by bill of review or by appeal to the House of Lords.

A bill of review may be had upon apparent error in judgment appearing on the face of the decree, or by special leave of the court, upon oath made of the discovery of new matter or evidence which could not possibly be had or used at the time when the decree passed. But no new evidence or matter than in the knowledge of the parties, and which might have been used before, shall be a sufficient ground for a bill of review.[1]

An appeal to parliament, that is, to the House of Lords, is the *dernier resort* of the subject who thinks himself aggrieved by an interlocutory order or final determination in this court; and it is effected by *petition* to the House of Peers, and not by *writ of error,* as upon judgments at common law. No new evidence is admitted in the House of Lords upon any account, this being a distinct jurisdiction.[2]

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1. Still the practice. See 2 Barb. Ch. Pr., ch. 6; Puterburgh's Ch. Pl. & Pr. (4th Ed.), ch. 20.

2. An appeal and not a writ of error is the regular method of review in an appellate court; and the hearing is upon the whole case on the evidence already taken.

Upon the subject of chancery pleading and practice, see, generally, Daniel's Chan. Plead. & Prac., 3 vols.; Barbour's Chan. Plead. & Prac. (an excellent work); Puterburgh's Chan. Plead. & Prac.; Story's Equity Pleading; Shipman's Equity Pleading. See, also, vol. 2 of this series.

As to equity jurisprudence, see, generally, Eaton on Equity (1901); Story's Equity Jurisprudence, 2 vols.; Adams' Equity, and vol. 2 of this series.

The following note from the 1838 edition of Chitty's Blackstone contains so good a summary of the jurisdictions of courts of equity that it is in great part here reproduced: "The matters over which the court of chancery maintains an equitable jurisdiction have been arranged in the following alphabetical order; and as this analysis has the recommendation of practical utility, we shall proceed to

embody the principal rules and decisions under each head respectively.

1st. ACCIDENT AND MISTAKE.

2d. ACCOUNT.

3d. FRAUD.

4th. INFANTS.

5th. SPECIFIC PERFORMANCE OF AGREEMENTS.

6th. TRUSTS.

1st. ACCIDENT AND MISTAKE.— By accident is meant, where a case is distinguished from others of the like nature by unusual circumstances, for the court of chancery cannot control the maxims of the common law, because of general inconvenience; but only where the observation of a rule is attended with some unusual and particular inconvenience. 10 Mod. 1.

1. *Bonds, &c.*— Equity will relieve against the loss of deeds (3 V. & B. 54), or bonds (5 Ves. 235; 6 Ves. 812); but not if the bond be voluntary. 1 Ch. Ca. 77. It will also set up a bond so lost or destroyed, against sureties, though the principal be out of the jurisdiction. 3 Atk. 93; 1 Ch. Ca. 77; 9 Ves. 464. Bonds made *joint*, instead of several, may be modified according to intent in some cases. 2 Atk. 33; 9 Ves. 118; 17 Ves. 514; 1 Meriv. 564.

Boundaries, &c.— Equity will ascertain the boundaries, or fix the value, where lands have been intermixed by unity of possession. 2 Meriv. 507; 1 Swanst. 9. So to distinguish copyhold from freehold lands within the manor. 4 Ves. 180; Nels. 14.

Penalties, Forfeitures, &c., incurred by accident, are relieved against (2 Vern. 594; 1 Sw. 453; 1 Bro. C. C. 418; 2 Sch. & Lef. 685), where the thing may be done afterwards, or a compensation made for it. 1 Ch. Ca. 24; 2 Ventr. 352; 9 Mod. 22; 18 Ves. 63. But no relief is given in the case of a voluntary composition, payable at a fixed period. Amb. 332; see 1 Vern. 210; 2 Atk. 527; 3 Atk. 585; 16 Ves. 372. Equity will not relieve against the payment of stipulated, or as they are sometimes called, liquidated damages (2 Atk. 194; Finch, 117; 2 Cha. Ca. 198; 6 Bro. P. C. 470; 1 ox, 27; 2 Bos. & P. 346; 3 Atk. 395); and forfeitures under acts of parliament, or conditions in law, which do not admit of compensation, or a forfeiture which may be considered as a limitation of an estate, which determines it when it happens, cannot be relieved against. 1 Ball & Bat. 373, 478; 1 Stra. 447, 452; Prec. Ch. 574.

Mistake.— A defective conveyance *to charitable uses* is always aided (1 Eden. 14; 2 Vern. 755; Prec. Ch. 16; 2 Vern. 453; Hob. 136); but neither a mistake in a fine (if after death of conusor), or in the names in a recovery are supplied, especially against a purchaser. 2 Vern. 3 Ambl. 102. Nor an erroneous recovery in the manorial court. 1 Vern. 367. Mistakes in a deed or contract, founded on *good consideration*, may be rectified. 1 Ves. 317; 2 Atk. 203. And if a bargain and sale be made and not enrolled within six months, equity will compel the vendor to make a good title, by executing another bargain and sale which may be enrolled. 6 Ves. 745. A conveyance defective in form may be rectified (1 Eq. Ab. 320; 1 P. W. 279), even against assignees (2 Vern. 564; 1 Atk. 162; 4 Bro. C. C. 472), or against representatives. 1 Anst. 14. So defects in surrenders of copyhold. 2 Vern. 564: Salk. 449; 2 Vern. 151. But not the omission of formalities required by act of parliament in conveyances. 5

Ves. 240; 3 Bro. C. C. 571; 13 Ves. 588; 15 Ves. 60; 6 Ves. 745; 11 Ves. 626. Defects in the mode of conveyance may be remedied. 4 Bro. C. C. 382. So the execution of powers. 2 P. W. 623.

2d. ACCOUNT.—*Mutual* dealings and demands between parties, which are too complex to be accurately taken by trial at law, may be adjusted in equity [1 Sch. & Lefroy, 309; 13 Ves. 278, 9; 1 Mad. Ch. 86 and note (i)]; but if the subject be matter of set-off at law, and capable of proof, a bill will not lie (6 Ves. 136); and the difficulty in adjusting the account constitutes no legal objection to an action. 5 Taunt. 481; 1 Marsh, 115; 2 Camp. 238.

3d. FRAUD.—Equity has so great an abhorrence of fraud, that it will set aside its own decrees if founded thereupon; and a bill lies to vacate letters patent obtained by fraud. 13 Vin. Ab. 543, pl. 9; 1 Vern. 277. All deceitful practices and artful devices, contrary to the plain rules of common honesty, are frauds at common law, and punishable there; but for some frauds or deceits there is no remedy at law, in which cases they are cognizable in equity, as one of the chief branches of its original jurisdiction. 2 Ch. Ca. 193; Finch, 161; 2 P. W. 270; 2 Vern. 189; 2 Atk. 324; 3 P. W. 130; Brig. Ind. tit. Fraud, pl. 1. Where a person is prevented by fraud from executing a deed, equity will regard it as already done. 1 Jac. & W. 99.

1. *Trustees* are in no case permitted to purchase from themselves the trust estate (1 Vern. 465), nor their solicitor. 3 Mer. 200. Nor in bankruptcy are the commissioners (6 Ves. 617) or assignees (6 Ves. 627), nor their solicitors. 10 Ves. 381. Nor committee or keeper of a lunatic (13 Ves. 156), nor an executor (1 Ves. & B. 170; 1 Cox, 134), nor governors of charities. 17 Ves. 500.

2dly. *Attorney and Client.*—Fraud in transactions between attorneys and client is guarded against most watchfully. 2 Ves. J. 201; 1 Mad. Ch. 114, 5, 116.

3dly. *Heirs, Sailors, &c.*—Equity will protect improvident heirs against agreements binding on their future expectancies, negotiated during some temporary embarrassment, provided such agreement manifest great inadequacy of consideration. 1 Vern. 169; 2 Vern. 27; 1 P. W. 310; 1 Bro. C. C. 1; 2 Ves. 157. It will also set aside unequal contracts obtained from sailors respecting their prize-money (Newl. Cont. 443; 1 Wils. 229; 2 Ves. 281, 516), and the fourth section of 20 G. III. c. 24), declares all bargains, etc., concerning any share of a prize taken from any of his majesty's enemies, etc., void. Vid. Newl. Cont. 444.

4thly. *Guardian.*—Fraud between guardian and ward is also the subject of strict cognizance in the court of chancery. For the details under this head, see 1 book, ch. XVII, and notes.

5thly. *Injunctions.*—In a modern work the subject of injunctions is considered under the head of Fraud (see 1 Mad. Ch. 125), but it seems to deserve a distinct consideration. An injunction is a method by which the court of chancery interferes to prevent the commission of fraud and mischief. The exercise of this authority may be obtained: 1st. To stay proceedings in other courts. 2d. To restrain infringements of patent. 3d. To stay waste. 4th. To preserve copyright. 5th. To restrain negotiation of bills, etc., or the transfer of stock. 6th.

To prevent nuisances, and in most cases where the rights of others are invaded, and the remedy by action at law is too remote to prevent increasing damage. See 1 Mad. Ch. 157 to 165. An injunction to stay proceedings at law does not extend to a distress for rent. 1 Jac. & W. 392. Nor has equity any jurisdiction to stop goods in transitu in any case, nor will the court restrain the sailing of a vessel for such purpose by injunction. 2 Jac. & W. 349.

6thly. *Bills of Peace*, which form an essential check in litigation. 1 Bro. P. C. 266; 2 Bro. P. C. 217; Bunb. 158; 1 P. W. 671; Prec. Ch. 262; 1 Stra. 404. For this purpose a perpetual injunction will be granted. See 10 Mod. 1; 1 Bro. P. C. 268. This bill cannot hold in disputes between two persons only. 2 Atk. 483, 391; 4 Bro. C. C. 157; Vin. tit. Ch. 425, pl. 35; 3 P. W. 156.

7thly. *Bill of Interpleader* will lie to prevent fraud or injustice, where two or more parties claim adversely to each other, from him in possession (otherwise it will not lie, 1 Mer. 405); for in such case, it is necessary the two claimants should settle their rights before the person holding possession be required to give up to either. 2 Ves. J. 310; Mitf. Pl. 39; 1 Mad. Ch. 173. And on the same principle.

8thly. *Bills or Writs of Certiorari*, to remove a cause from an inferior, or incompetent jurisdiction.

9thly. *Bills to perpetuate testimony* in danger of being lost before the right can be ascertained.

10thly. *Bills to discover evidence* in possession of defendant, whereof plaintiff would be otherwise wholly deprived, or of deeds, etc., in defendant's custody.

11thly. *Bills of Quia Timet* for the purpose of preventing a possible future injury, and thereby quieting men's minds and estates, etc. 1 Mad. Ch. 224; Newl. on Contr., 93, 493.

12thly. *Bills for the delivering up of Deeds.*—As where an instrument is void at common law, as being against the policy of the law, it belongs to the jurisdiction of equity to order it to be delivered up. 11 Ves. 535. In Mayor, etc., of Colchester v. Lowton, Lord Eldon says, "My opinion has always been (differing from others) that a court of equity has jurisdiction and duty to order a void deed to be delivered up, and placed with those whose property may be affected by it, if it remains in other hands." 1 Ves. & B. 244.

13th. Bills for *apportionment* or *contribution* between persons standing in particular relations one to another. 5 Ves. 792; 2 Freem. 97.

14th. For *dower* and *partition.*

15th. To establish *moduses.*

16th. Bills to *marshal securities.*

17th. Bills to secure property in litigation in *other courts.* And

18th and lastly. Bills to compel lords of manors to hold courts, or to admit copyholders and bills to reverse erroneous judgments in copyhold courts. Vide 1 Mad. Ch. 242 to 253.

4th. INFANTS.—The protection and care which the court of chancery exercises over infants have already been incidentally noticed. Vide 1 book, chs. XVI, XVII, and notes.

Wards of Court.—To make a child a ward of court, it is sufficient to file a bill; and it is a contempt to marry a ward of court, though the infant's father be living. Ambl. 301. The court of chancery, representing the king as *parens patriae*, has jurisdiction to control the right of the

father to the possession of his infant; but the court of K. B. has not any portion of that delegated authority. The court of chancery will restrain the father from removing his child, or doing any act towards removing it out of the jurisdiction. So will the court refuse the possession of the child to its mother, if she has withdrawn herself from her husband. 10 Ves. 52; Co. Lit. 89 (a), n. 70; 2 Fonb. Tr. Eq. 224, n. (a); 2 Bro. C. C. 499; 1 P. W. 705; 4 Bro. C. C. 101; 2 P. W. 102. The court retains its jurisdiction over the property of a ward of court after 21, if it remains in court; and if the ward marries, will order a proper settlement to be made, or reform an improper one, unless the ward consents to the settlement either in court or under a commission. 2 Sim. & Stu. 123, n. (a). In case the husband assign the property of the wife, who is a ward of court, it shall not prevail, but the court will direct even the whole of the property in question to be settled on the wife and her children, and the assignee will not be entitled even to the arrear of interest accrued since the marriage. 3 Ves. 506.

5th. SPECIFIC PERFORMANCE OF AGREEMENTS.—The jurisdiction of the courts of equity, in matters of this kind, though certainly as ancient as the reign of Edward IV., did not obtain an unresisting and uniform acquiescence on the part of the public till many years afterwards. See 1 Roll. Rep. 354; 2 ib. 443; Latch. 172.

Realty. — Thus equity enforces agreements for the purchase of lands, or things which relate to realties, but not (generally) those which relate to personal chattels, as the sale of stock, corn, hops, etc., in such cases the remedy is at law. 3 Atk. 383; Newl. Cont. 87.

That which is agreed to be done is in equity considered as already done (2 P. W. 222); and therefore when a husband covenants on his marriage to make a settlement charged upon his lands, which he is afterwards prevented from completing by sudden death, the heir shall make satisfaction of the settlement out of the estate. Ib., 233.

Personalty.— In agreements, with penalties for the breach of them, it is necessary to distinguish the cases of a penalty intended as a security, for a collateral object, from those where the contract itself has *assessed the damages* which the party is to pay, upon his doing or omitting to do the particular act. In these latter cases, equity will not interfere either to prevent or to enforce the act in question, or to restrain the recovery of damages after they have become due. But in the former, where it plainly appears that the specific performance of that act was the primary object of the agreement, and the penalty intended merely to operate as a collateral security for its being done, though at law the party might make his election, either to do the particular act or to pay the penalty, a court of equity will not permit him to exercise such right, but will compel him to perform the object of the agreement. Newl. Cont. cap. 17. Thus, as the principle whereon a specific performance of agreement relating to personals is refused, is, that there is as complete a remedy to be obtained at law, therefore, where a party sues merely on a memorandum, of agreement (a mere memorandum not being regarded as valid at law), a court of equity will give relief, for equity suffers not a right to be without a remedy. 3 Atk. 382, 385. But it is only where the legal remedy is

inadequate or defective, that courts of equity interfere. 8 Ves. 163. Equity will not enforce an agreement for the transfer of stock (10 Ves. 161); but it has been held that a bill will lie for performance of agreement for purchase of government stock, where it prays for the delivery of the *certificates* which give the legal title to stock. 1 Sim. & Stu. 590. And it seems the court will entertain a suit for the specific performance of a contract for the purchase of a debt. 5 Price, 325. So to sell the goodwill of a trade, and the exculsive use of a secret in dyeing (1 Sim. & Stu. 74); but not without great caution. See 1 P. Wms. 181.

6th. TRUSTS.—Trusts may be created of real or personal estate, and are either, 1st, *Express;* or, 2d, *Impiled.* Under the head of implied trusts may be included all resulting trusts, and all such trusts as are not express. Express trusts are created by deed or will. Implied trusts arise, in general, by construction of law, upon the acts or situation of parties. 1 Mad. Cha. 446.

Lunatics.—The custody of the persons and estates of lunatics was a power not originally in the crown, but was given to it by statute, for the benefit of the subject. 1 Ridgw. P. C. 224, *et vid.* 2 Inst. 14. And now, by the statute *de prerogativa regis* (17 Edw. II., c. 9 & 10), the king shall have the real estates of idiots to his own use, and he shall provide for the safe keeping of the real estates of lunatics, so that they shall have a competent maintenance, and the residue is to be kept for their use. 1 Ridg. P. C. 519, 535. A liberal application of the property of a lunatic is made to secure every comfort his situation will admit (6 Ves. 8). without regard to expectants on estate. 1 Ves. J. 297. The power of the chancellor extends to making grants from time to time of the lunatic's estate, and as this power is derived under the sign manual, in virtue of the prerogative of the crown, the chancellor, who is usually invested with it, is responsible to the crown alone for the right exercise of it, per Ld. Hardw. 3 Atk. 635. It is said, that since the revolution the king has always granted the surplus profits of the estate of an idiot to some of his family. Ridgw. P. C. 519, App. note (1).

Charities.—The general controlling power of the court over charities, does not extend to a charity regulated by governors under a charter, unless they have also the management of the revenues, and abuse their trust; which will not be presumed, but must be apparent, and made out by evidence. 2 Ves. J. 42. The internal management of a charity is the exclusive subject of visitorial jurisdiction; but under a trust as to the revenue, abuse by misapplication is controlled in chancery. 2 Ves. & B. 134.

Executors.—Where an executor has an express legacy, the court of chancery looks upon him as a trustee with regard to the surplus, and will make him account, though the spiritual court has no such power. 1 P. W. 7. And where an executor, who was directed to lay out the testator's personalty in the funds, unnecessarily sold out stock, kept large balances in his hand, and resisted payment of debts by false pretences of outstanding demands, he was charged with five per cent. interest and costs, but the court refused to make rests in the account. 1 Jac. & W. 586. And see on this subject, *ante,* 2 book, ch. 32.

Marshalling Assets.—The testator's whole personal property, whether devised or not, is assets both in law and equity, to which creditors by simple contract, or of any higher order, may have recourse for the satisfaction of their demands. But the testator may, by clear and explicit words, exempt his personalty from payment of debts as against the devisee of his realty, though not as against creditors. The rule in equity is, that in case even of a specialty debt, the personal assets shall be first applied, and if deficient, and there be no devise for payment of debts, the heir shall then be charged for assets descended. 2 Atk. 426, 434. For lands are in equity a favoured fund, insomuch that the heir at law, or devisee of a mortgagor, may demand to have the estate mortgaged by such devisor himself, cleared out of the personalty. Vin. Ab. tit. Heir, U. pl. 35; 1 Atk. 487. And a specific devisee of a mortgaged estate is entitled to have it exonerated out of real assets descended. 3 Atk. 430, 439. But at law there is no such distinction of favour shewn to lands; a bond creditor may, if he please, proceed immediately against the heir, without suing the personal representative of his deceased debtor. As to the order in which real assets shall be applied in equity for payment of debts (after exhausting the personal effects, supposing them not exempted), the general rule is, first, to take lands devised simply for that purpose, then lands descended, and lastly estates specifically devised, even though they are *generally charged with the payment of debts.* 2 Bro. 263.

Equitable assets are such as at law cannot be reached by a creditor, as a devise in trust to pay debts, of an equity of redemption subject to a mortgage *in fee*, or where the descent is broke by a devise to sell for the payment of debts. 1 Vern. 411; 1 Ch. Ca. 128 n.; 2 Atk. 290. But lands so devised, subject to a mortgage *for years*, are *legal* assets.

Bankruptcy.—See the consolidation act, 6 Geo. IV., c. 16, commencing its operation with the present year, and the decisions applicable to its several enactments, *ante*, 2 book, ch. 31, in notes.

BOOK THE FOURTH.

OF PUBLIC WRONGS.

CHAPTER 1.

OF THE NATURE OF CRIMES AND THEIR PUNISHMENT.

I. A crime or misdemeanor is an act committed or omitted in violation of a public law either forbidding or commanding it. [5]

The distinction of public wrongs from private, of crimes and misdemeanors from civil injuries, seems principally to consist in this: that private wrongs or civil injuries are an infringement or privation of the civil rights which belong to individuals considered merely as individuals; public wrongs or crimes and misdemeanors are a breach and violation of the public rights and duties due to the whole community considered as a community in its social aggregate capacity. **In all cases the crime includes an injury** [tort]. Every public offence is also a private wrong and somewhat more; it affects the individual, and it likewise affects the community. In these gross and atrocious injuries [treason, murder, robbery] the private wrong is swallowed up in the public. Indeed, as the public crime is not otherwise avenged than by forfeiture of life and property,[1] it is impossible afterwards to make any reparation for the private wrong, which can only be had from the body or goods of the aggressor. [6] But there are crimes of an inferior nature, in which the public punishment is not so severe; but it affords room for a private compensation also, and herein the distinction of crimes from civil injuries is very apparent. For instance, in the case of battery, or

1. See later on as to forfeiture.

beating another, the aggressor may be indicted for this at the suit of the king for disturbing the public peace, and be punished criminally by fine and imprisonment; and the party beaten may also have his private remedy by action of trespass for the injury which he in particular sustains, and recover a civil satisfaction in damages. So, also, in case of a public nuisance, as digging a ditch across a highway, this is punishable by indictment as a common offence to the whole kingdom and all his majesty's subjects; but if any individual sustains any special damage thereby, as laming his horse, breaking his carriage, or the like, the offender may be compelled to make ample satisfaction, as well for the private injury as for the public wrong.[2] [7]

II. [As to the *power*, the *end*, and the *measure* of human punishment, the student is referred to the text, p. 7 *et seq.*] [3]

2. See Clark's Crim. Law (2d Ed.), 1-7.

3. The English law in the time of our author was very sanguinary. In modern times it has been greatly ameliorated both in England and the United States. Consult the local statutes.

CHAPTER II.

OF THE PERSONS CAPABLE OF COMMITTING CRIMES.

The general rule is that no person shall be excused from punishment for disobedience to the laws of his country, excepting such as are expressly defined and exempted by the laws themselves. [20]

All the several pleas and excuses which protect the committer of a forbidden act from the punishment which is otherwise annexed thereto may be reduced to this single consideration, the **want or defect of will.** To make a complete crime cognizable by human laws, there must be both a will and an act. [21] In all temporal jurisdictions **an overt act,** or some open evidence of an intended crime, is necessary in order to demonstrate the depravity of the will before the man is liable to punishment. And as a vicious will without a vicious act is no civil crime, so, on the other hand, an unwarrantable act without a vicious will is no crime at all. So that to constitute a crime against human laws there must be first, a vicious will, and secondly, an unlawful act consequent upon such vicious will.[1]

Now there are three cases in which the will does not join with the act: 1. Where there is a defect of understanding. 2. Where there is understanding and will sufficient residing in the party, but not called forth and exerted at the time of the action done, which is the case of all **offences committed by chance or ignorance.** Here the will sits neuter, and neither concurs with the act nor disagrees to it. 3. **Where the action is constrained by some outward force and violence.** Here the will counteracts the deed, and is far from concurring with, that it loathes and disagrees to what the man is obliged to perform.

I. First, **infancy or nonage,** which is a defect of the understanding. [22] Infants under the age of discretion ought not to be punished by any criminal prosecution whatever. The law of England does in some cases privilege an

1. Clark's Crim. Law (2d Ed.), 14.

infant under the age of twenty-one as to **common misdemeanors**, so as to escape fine, imprisonment, and the like, and particularly in cases of omission, as not repairing a bridge or highway, and other similar offences; for, not having the command of his fortune till twenty-one, he wants the capacity to do those things which the law requires. But where there is any notorious **breach of the peace**,— a riot, battery, or the like (which infants when full grown are at least as liable as others to commit),— for these an infant **above the age of fourteen** is equally liable to suffer as a person of the full age of twenty-one.[2] [23]

With regard to capital crimes, the law is still more minute and circumspect. By the law as it now stands and has stood at least ever since the time of Edward III. the capacity of doing ill or contracting guilt is not so much measured by years and days as by the strength of the delinquent's understanding and judgment; for one lad of eleven years old may have as much cunning as another of fourteen; and in these cases our maxim is that "*malitia supplet aetatem.*" **Under seven years of age**, indeed, an infant cannot be guilty of felony, for then a felonious discretion is almost an impossibility in nature; but at eight years old he may be guilty of felony.[3] **Also under fourteen**, though an infant shall be *prima facie* adjudged to be *doli incapax*, yet if it appear to the court and jury that he was *doli capax*, and could discern between good and evil, he may be convicted and suffer death. But in all such cases the evidence of that malice which is to supply age ought to be strong and clear beyond all doubt and contradiction.[4]

II. The second case of a deficiency in will which excuses from the guilt of crimes arises also from a defective or vitiated understanding, viz., in **an idiot or a lunatic**.[5] In

2. Wash. Cr. L. (3d Ed.) 19.

3. The ages of criminal capacity are variously fixed by statute in the United States. In Illinois an infant under ten years of age cannot be found guilty of any crime. Rev. Stat. Ill. 1874, 394, § 283; see Clark's Crim. Law, 59, and the local statutes. If the rule has not been changed by statute, the common law prevails.

4. See preceding note.

5. The general rule in England and this country is that if a person is incapable by reason of idiocy or lun-

criminal cases idiots and lunatics are not chargeable for their own acts if committed when under these incapacities; no, not even for treason itself. Also, if a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if after he has pleaded the prisoner becomes mad, he shall not be tried; for how can he make his defence? If after he be tried and found guilty he loses his senses before judgment, judgment shall not be pronounced, and if after judgment he becomes of nonsane memory, execution shall be stayed. But if there be any doubt whether the party be *compos* or not, this shall be tried by a jury. [25] And if he be so found, a total idiocy or absolute insanity excuses from the guilt, and of course from the punishment of any criminal action committed under such deprivation of the senses; **but if a lunatic hath lucid intervals** of understanding, **he shall answer for what he does in those intervals** as if he had no deficiency.

III. Thirdly, **as to artificial, voluntarily contracted madness, by drunkenness or intoxication,** which, depriving men of their reason, puts them in a temporary frenzy, our law looks upon this as an aggravation of the offence rather than as an excuse for any criminal misbehavior.[6] [26]

IV. A fourth deficiency of will is where a man commits

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acy of distinguishing between right and wrong as to the particular act, he lacks criminal capacity. Clark's Crim. Law (2d Ed.), 61 and cases cited. McNaghten's Case, 10 Clark & Fin. 200, established this rule. This rule has not always been approved. See Clark's Crim. Law, 65 and note (irresistable impulse); Scott v. Com., 4 Met. (Ky.) 227 (moral insanity). See, also, Parsons v. State, 81 Ala. 577.

6. Clark's Crim. Law (2d Ed.), 70. There are three exceptions to this rule: (1) Where the act is committed while accused labors under settled insanity or delirium tremens resulting from intoxication. Clark's Crim. Law (2d Ed.), 70. (2) Where a specific intent constitutes an essential element of the crime, intoxication may negative such intent. Id., 70; Roberts v. The People, 19 Mich. 401; Schwabacher v. People, 165 Ill. 618. (3) In murder intoxication may (if proved) be material as to the question of provocation and thus reduce the crime to manslaughter. Clark's Crim. Law, 70. Intoxication does not, however, aggravate the offence. Id.

an unlawful act by **misfortune or chance**, and not by design. Here the will observes a total neutrality, and does not cooperate with the deed, which therefore wants one main ingredient of a crime. If any accidental mischief happens to follow from the performance of a *lawful* act [in a lawful manner], the party stands excused from all guilt;[7] but if a man be doing anythin *unlawful* [and morally wrong, not merely *malum prohibitum*], and a consequence ensues which he did not foresee or intend, as the death of a man or the like, his want of foresight shall be no excuse, for, being guilty of one offence in doing antecedently what is in itself unlawful, he is criminally guilty of whatever consequence may follow the first misbehavior.[8] [27]

V. Fifthly, **ignorance or mistake** is another defect of will, when a man intending to do a lawful act does that which is unlawful. For here, the deed and the will acting separately, there is not that conjunction between them which is necessary to form a criminal act.[9] **But this must be an ignorance or mistake of fact** and not an error in point of law. As if a man, intending to kill a thief or housebreaker in his own house, by mistake kills one of his own family, this is no criminal action;[1] but if a man thinks he has a right to kill a person excommunicated or outlawed wherever he meets him, and does so, this is wilful murder. For a mistake in point of law which every person of discretion not only may but is bound and presumed to know, is in criminal cases no sort of defence. **Ignorantia juris, quod quisque tenetur scire, neminem excusat,**[2] is as well the maxim of our own law as it was of the Roman.

VI. A sixth species of defect of will is that arising from **compulsion and inevitable necessity.** These are a constraint upon the will, whereby a man is urged to do that

7. Clark's Crim. Law, 176.

8. Negligence may be criminal. Clark's Crim. Law, 55. This question most commonly arises in prosecutions for manslaughter. Id.

9. Clark's Crim. Law, 56. The rule of the Six Carpenters' Case has no application to crime. Milton v. State, 24 So. Rep. (Fla.) 60.

1. Clark's Crim. Law, 82, 83.

2. Ignorance of the law which every one is bound to know, excuses no one. Broom's Leg. Max., *231.

which his judgment disapproves, and which, it is to be presumed, his will (if left to itself) would reject.

1. Of this nature, in the first place, is the **obligation of civil subjection**, whereby the inferior is constrained by the superior to act contrary to what his own reason and inclination would suggest: as when a legislator establishes iniquity by a law, and commands the subject to do an act contrary to religion or sound morality. [28]

As to persons in private relations, the principal case where constraint of a superior is allowed as an excuse for criminal misconduct is with regard to the matrimonal subjection of the wife to her husband; for neither a son nor a servant is excused for the commission of any crime, whether capital or otherwise, by the command or coercion of the parent or master. But if a woman commit theft, burglary, or other civil offences against the laws of society by the coercion of her husband or even in his company, which the law construes a coercion, she is [*prima facie*] not guilty of any crime, being considered as acting by compulsion and not of her own will.[3] [29] In inferior misdemeanors also we may remark another exception, that a wife may be indicted and set in the pillory *with* her husband for **keeping a brothel**. And in all cases where the wife offends alone, without the company or coercion of her husband, she is responsible for her offence as much as any feme-sole.

2. Another species of compulsion or necessity is what our law calls **duress per minas**, or threats and menaces, which induce a fear of death or other bodily harm, and which take away for that reason the guilt of many crimes and misde-

3. This presumption may of course be rebutted by evidence. Murder and treason are usually stated to be exceptions to this rule, and some add robbery also. Clark's Crim. Law, 93 and cases cited in notes.

Mr. Bishop does not except murder and treason. 1 Bish. Crim. Law (7th Ed.), § 357 *et seq.* So in 1 Whart. C. L., § 71 *et seq.*, the author takes the same view. In some states the rule has been changed by statute. It is subject to exceptions in those crimes which are from their nature generally committed by women such as keeping a brothel or other disorderly house and also for altering counterfeit coins. 1 Bish. Crim. Law (7th Ed.), § 351; Clark's Crim. Law (2d Ed.), 93; Com. v. Murphy, 2 Gray, 510; Penal Code Minn., § 22; Id., N. Y § 24.

meanors.[4] [30] But then that fear which compels a man to do an unwarrantable action ought to be just and well-grounded; such "*qui cadere possit in virum constantem, non timidum et meticulosum*,"[5] as Bracton expresses it. Therefore, in time of war or rebellion, a man may be justified in doing many treasonable acts by compulsion of the enemy or rebels, which would admit of no excuse in the time of peace. This, however, seems only, or at least principally, to hold as to **positive crimes** so created by the laws of society, and which therefore society may excuse; but not as to natural offences so declared by the law of God, wherein human magistrates are only the executioners of divine punishment. And therefore, though a man be violently assaulted, and hath no other possible means of escaping death but by killing an innocent person, this fear and force shall not acquit him of murder, for he ought rather to die himself than escape by the murder of an innocent. But in such a case he is permitted to kill the assailant, for there the law of nature and self-defence, its primary canon, have made him his own protector.

3. There is a third species of necessity which may be distinguished from the actual compulsion of external force or fear, being the result of reason and reflection, which act upon and constrain a man's will and oblige him to do an action which without such obligation would be criminal, and that is **when a man has his choice of two evils set before him, and, being under a necessity of choosing one,** he chooses the least pernicious of the two. [31] Here the will cannot be said freely to exert itself, being rather passive than active, or if active, it is rather in rejecting the greater evil than in choosing the less. Of this sort is that necessity where a man by the commandment of the law is bound to arrest another for any capital offence or to disperse a riot, and resistance is made to his authority: it is here justifiable and even necessary to beat, to wound, or perhaps to kill the offenders rather than permit the murderer to escape or the

4. Duress, however, is no excuse for murder. Clark's Crim. Law (2d Ed.), 91.

5. Such as might happen to a brave man not timid and fearful.

riot to continue. For the preservation of the peace of the kingdom and the apprehending of notorious malefactors are of the utmost consequence to the public, and therefore excuse the felony which the killing would otherwise amount to.

4. There is yet another case of necessity which has occasioned great speculation among the writers upon general law, viz., **whether a man in extreme want of food or clothing may justify stealing either** to relieve his present necessities? And this both Grotius and Puffendorf, together with many other of the foreign jurists, hold in the affirmative. But the law of England admits no such excuse at present.[6]

VII. Seventh, where the law supposes an incapacity of doing wrong, from the excellence and perfection of the person, which extend as well to the will as to the other qualities of his mind [33]: I mean **the case of the king**, who, by virtue of his royal prerogative, is not under the coercive power of the law, which will not suppose him capable of committing a folly, much less a crime.

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6. Clark's Crim. Law (2d Ed.), 95-97 and cases cited.

CHAPTER III.

OF PRINCIPALS AND ACCESSARIES.

I. **A man may be principal in an offence in two degrees.** [34] A principal in the first degree is he that is the actor or absolute perpetrator of the crime, and in the second degree, is he who is present, aiding and abetting the fact to be done.[1] Which **presence** need not always be an actual immediate standing by, within sight or hearing of the fact, but there may be also a constructive presence, as when one commits a robbery or murder, and another keeps watch or guard at some convenient distance. And this rule hath also other exceptions; for in case of murder by poisoning, a man may be a principal felon by preparing and laying the poison, or persuading another to drink it who is ignorant of its poisonous quality, or giving it to him for that purpose, and yet not administer it himself nor be present when the very deed of poisoning is committed. And the same reasoning will hold with regard to other murders committed in the absence of the murderer, by means which he had prepared beforehand, and which probably could not fail of their mischevious effect. [35] As by laying a trap or pitfall for another, whereby he is killed; letting out a wild beast with an intent to do mischief; or inciting a madman to commit murder, so that death thereupon ensues, — in every of these cases the party offending is guilty of murder as a principal in the first degree.

II. **An accessary** is he who is not the chief actor in the offence, nor present at its performance, but is some way concerned therein, either *before* or *after* the fact committed.

1. **As to what offences admit of accessaries,** and what not. **In high treason there are no accessaries,** but all are principals; the same acts that make a man accessary in felony making him a principal in high treason, upon account of the heinousness of the crime. Besides, it is to be considered

1. Clark's Crim. Law (2d Ed.), 101, 102.

that the bare intent to commit treason is many times actual treason, as imagining the death of the king or conspiring to take away his crown. And as no one can advise and abet such a crime without an intention to have it done, there can be no accessaries before the fact, since the very advice and abetment amount to principal treason. [36] **But this will not hold in the inferior species** of high treason, which do not amount to the legal idea of compassing the death of the king, queen, or prince. For in those no advice to commit them, unless the thing be actually performed, will make a man a principal traitor. **In petit treason, murder, and felonies**[2] **with or without benefit of clergy, there may be accessaries,** except only in those offenses which by judgment of law are sudden and unpremeditated, as manslaughter and the like, which therefore cannot have any accessaries *before* the fact. So too in **petit larceny and in all crimes under the degree of felony there are no accessaries** either *before* or *after* the fact, but all persons concerned therein, if guilty at all, are principals.[3]

2. **As to who may be an accessary before the fact,** Sir Matthew Hale defines him to be one who, being absent at the time of the crime committed, doth yet procure, counsel, or command another to commit a crime. Herein absence is necessary to make him an accessary; for if such a procurer or the like be present, he is guilty of the crime as principal.[4] If A then advise B to kill another, and B does it in the absence of A, now B is principal, and A is accessary in the murder. [37] And this holds even though the party killed be not *in rerum natura* at the time of the advice given. As if A, the reputed father, advises B, the mother of a

2. The distinction between principals and accessories is recognized in felony only. Clark's Crim. Law (2d Ed.), 100. Petit treason does not exist in the United States.

3. Clark's Crim. Law (2d Ed.), 100.

4. Id., 109. If one sets a dog upon another whom he bites, he is the principal in an assault and battery; so, if one incites an insane person or an idiot or an infant of tender years who, not knowing it is wrong, is thereby induced to commit an act otherwise a crime, the person so procuring the act to be done is a principal. Com. v. Hill, 11 Mass. 136; People v. McMurray, 4 Parker's Cr. Rep. 234.

bastard child, unborn, to strangle it when born, and she does so, A is accessary to this murder. And it is also settled that whoever procureth a felony to be committed, though it be by the intervention of a third person, is an accessary before the fact. It is likewise a rule that he who in any wise commands or counsels another to commit an unlawful act is accessary to all that ensues upon that unlawful act, but is not accessary to any act distinct from the other. And if A commands B to beat C, and B beats him so that he dies, B is guilty of murder as principal, and A as accessary. But if A commands B to burn C's house, and he in so doing commits a robbery, now A, though accessary to the burning, is not accessary to the robbery, for that is a thing of a distinct and unconsequential nature. But if the felony committed be the same in substance with that which is commanded, and only varying in some circumstantial matters, as if, upon a command to poison Titius, he is stabbed or shot, and dies, the commander is still accessary to the murder, for the substance of the thing commanded was the death of Titus, and the manner of its execution is a mere collateral circumstance.

3. **An accessary after the fact** may be where a person, knowing a felony to have been committed, receives, relieves, comforts, or assists the felon. Therefore, to make an accessary *ex post facto* it is in the first place requisite that he knows of the felony committed. In the next place he must receive, relieve, comfort, or assist him. And generally any assistance whatever given to a felon, to hinder his being apprehended, tried, or suffering punishment, makes the assister an accessary. As furnishing him with a horse to escape his pursuers, money or victuals to support him, a house or other shelter to conceal him, or open force and violence to rescue or protect him. [38] So likewise to convey instruments to a felon to enable him to break gaol, or to bribe the gaoler to let him escape, makes a man an accessary to the felony.[5] But to relieve a felon in gaol with clothes or other necessaries is no offence, for the crime im-

5. Clark's Crim. Law (2d Ed.), 113.

putable to this species of accessary is the hinderance of public justice, by assisting the felon to escape the vengeance of the law. **To buy or receive stolen goods, knowing them to be stolen,**[6] falls under none of these descriptions: it was therefore at common law a mere misdemeanor, and made not the receiver accessary to the theft, because he received the *goods* only, and not the *felon;* but now, by the statutes 5 Anne, c. 31, and 4 Geo. I. c. 11, all such receivers are made accessaries.

The felony must be complete at the time of the assistance given, else it makes not the assistant an accessary. As if one wounds another mortally, and after the wound given, but before death ensues, a person assists or receives the delinquent, this does not make him accessary to the homicide, for till death ensues there is no felony committed. But so strict is the law where a felony is actually complete, in order to do effectual justice, that **the nearest relations are not suffered to aid or receive one another.** If the parent assists his child, or the child the parent, if the brother receives the brother, the master his servant, or the servant his master, or even if the husband relieves his wife, who have any of them committed a felony, the receivers become accessaries *ex post facto.* [39] But a feme-covert cannot become an accessary by the receipt and concealment of her husband; for she is presumed to act under his coercion, and therefore she is not bound, neither ought she, to discover her lord.

4. **How are accessaries to be treated** considered distinct from principals.

And the general rule of the ancient law is this, that accessaries shall suffer the same punishment as their principals.

[The reasons for the elaborate distinctions between accessaries and principals are] (1) to distinguish the nature and denomination of crimes, that the accused may know

6. It is now by statute made a substantive crime in itself. McClain's Crim. Law, § 713; Clark's Crim. Law, 327.

See, generally, on the subject of Principal and Accessory, the case of Spies v. The People, 122 Ill. 1 (the so-called anarchist case).

how to defend himself when indicted; the commission of an actual robbery being quite a different accusation from that of harboring the robber.

(2) Because now by the statutes relating to the benefit of clergy, distinction is made between them; accessaries *after* the fact being still allowed the benefit of clergy in all cases, except horse-stealing and stealing of linen from bleaching-grounds.

(3) Because formerly no man could be tried as accessary till after the principal was convicted, or at least he must have been tried at the same time with him;[7] though that law is now much altered, as will be shown more fully in its proper place. [40] (4) Because, though a man be indicted as accessary and acquitted, he may afterwards be indicted as principal, for an acquittal of receiving or counselling a felon is no acquittal of the felony itself; but it is matter of some doubt whether, if a man be acquitted as principal, he can be afterwards indicted as accessary before the fact, since those offences are frequently very nearly allied, and therefore an acquittal of the guilt of one may be an acquittal of the other also. But it is clearly held that one acquitted as principal may be indicted as an accessary *after* the fact, since that is always an offence of a different species of guilt, principally tending to evade the public justice, and is subsequent in its commencement to the other.

7. Clark's Crim. Law (2d Ed.), 115. But this rule has been changed by statute in most of the states. Id.; Wash. Crim. Law (3d Ed.), 162 and cases cited.

CHAPTER IV.

OF OFFENCES AGAINST GOD AND RELIGION.

[Apostasy, hersy, and offences affecting an established church are offences happily unknown to the American law, and hence are omitted.]

IV. The fourth species of offences more immediately against God and religion is that of **blasphemy** against the Almighty by denying his being or providence, or by contumelious reproaches of our Saviour Christ. [59] Whither also may be referred all profane scoffing at the holy scripture, or exposing it to contempt and ridicule. These are offences punishable at common law by fine and imprisonment, or other infamous corporal punishment; for Christianity is part of the laws of England.[1]

V. Somewhat allied to this, though in an inferior degree, is the offence of **profane and common swearing and cursing.**[2] [60] By the last statute against which, 19 Geo. II. c. 21, which repeals all former ones, every laborer, sailor, or soldier profanely cursing or swearing shall forfeit 1*s.*, every other person under the degree of a gentleman 2*s.*, and every gentleman or person of superior rank 5*s.* to the poor of the parish, and on the second conviction double, and for every subsequent offence treble the sum first forfeited, with all charges of conviction, and in default of payment shall be sent to the house of correction for ten days.

VI. A sixth species of offence against God and religion, of which our ancient books are full, is the offence of **witchcraft, conjuration, enchantment, or sorcery.** [Obsolete.]

VII. A seventh species of offenders in this class are **all religious impostors,** such as falsely pretend an extraordinary commission from heaven, or terrify and abuse the people with false denunciations of judgments. [62] These, as tending to subvert all religion by bringing it into ridicule

1. This is true only in a limited sense. See discussion in Cooley's Const. Lim. (7th Ed.), 570 *et seq.*

2. Made misdemeanors by statute in some states.

and contempt, are punishable by the temporal courts with fine, imprisonment, and infamous corporal punishment.

VIII. **Simony**, or the corrupt presentation of any one to an ecclesiastical benefice for gift or reward, is also to be considered as an offence against religion.

IX. **Profanation of the Lord's Day**, vulgarly (but improperly) called *Sabbath-breaking*, is a ninth offence against God and religion punished by the municipal law of England.[3]

X. **Drunkenness** is also punished by statute 4 Jac. I. c. 5, with the forfeiture of 5*s.*, or the sitting six hours in the stocks, by which time the statute presumes the offender will have regained his senses, and not be liable to do mischief to his neighbors.[4] [64]

XI. The last offence, more immediately against religion and morality, and cognizable by the temporal courts, is that of **open and notorious lewdness**, either by frequenting houses of ill-fame, which is an indictable offence, or by some grossly scandalous and public indecency, for which the punishment is by fine and imprisonment. The temporal courts take no cognizance of the crime of adultery otherwise than as a private injury.[5]

3. This subject has been variously legislated upon in this country.

4. Also punished by statute in some of the states.

5. Made criminal by statute in some of the states.

CHAPTER V.

OF OFFENCES AGAINST THE LAW OF NATIONS.[1]

The law of nations is a system of rules deducible by natural reason and established by universal consent among the civilized inhabitants of the world, in order to decide all disputes, to regulate all ceremonies and civilities, and to insure the observance of justice and good faith in that intercourse which must frequently occur between two or more independent states and the individuals belonging to each. [66] This general law is founded upon this principle, that different nations ought in time of peace to do one another all the good they can, and in time of war as little harm as possible, without prejudice to their own real interests. And as none of these states will allow a superiority in the other, therefore neither can dictate or prescribe the rules of this law to the rest, but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree, or they depend upon mutual compacts or treaties between the respective communities, in the construction of which there is also no judge to resort to but the law of nature and reason, being the only one in which all the contracting parties are equally conversant, and to which they are equally subject. [67]

The principal offences against the law of nations, animadverted on as such by the municipal laws of England, are of three kinds: 1, Violation of safe-conducts; 2. Infringement of the rights of ambassadors; and 3, Piracy. [68]

1. As to the first, **violation of safe-conducts or passports,**[2] expressly granted by the king or his ambassadors to the subjects of a foreign power in time of mutual war, or committing acts of hostilities against such as are in amity,

1. These offences are all cognizable only in the United States courts.

2. As the United States as a nation has no common law all these crimes where they exist are made such by the statutes. The student should, therefore, in every instance, consult the Revised Statutes of the United States. See Clark's Crim. Law (2d Ed.), 412.

league, or truce with us, who are here under a general implied safe-conduct, these are breaches of the public faith, without the preservation of which there can be no intercourse or commerce between one nation and another; and such offences may, according to the writers upon the law of nations, be a just ground of a national war, since it is not in the power of the foreign prince to cause justice to be done to his subjects by the very individual delinquent, but he must require it of the whole community. [69] And as during the continuance of any safe-conduct, either express or implied, the foreigner is under the protection of the king and the law; and, more especially, as it is one of the articles of *Magna Carta* that foreign merchants should be entitled to safe-conduct and security throughout the kingdom, — there is no question but that any violation of either the person or property of such foreigner may be punished by indictment in the name of the king, whose honor is more particularly engaged in supporting his own safe-conduct.

2. **As to the rights of ambassadors,** which are also established by the law of nations, they have formerly been treated of at large.[3] [70] It may here be sufficient to remark that the common law of England recognises them in their full extent by immediately stopping all legal process sued out through the ignorance or rashness of individuals which may intrench upon the immunities of a foreign minister or any of his train. And the more effectually to enforce the law of nations in this respect, when violated through wantonness or insolence, it is declared by the statute 7 Anne, c. 12, that all process whereby the person of any ambassadors, or of his domestic or domestic servant, may be arrested, or his goods distrained or seized, shall be utterly null and void, and that all persons prosecuting, soliciting, or executing such process, being convicted by confession or the oath of one witness before the Lord Chancellor and the chief justices, or any two of them, shall be deemed violators of the law of nations and disturbers of the public repose, and shall suffer such penalties and corporal

3. Book 1, p. 253.

punishment as the said judges, or any two of them, shall think fit.[3] [71]

3. Lastly, the crime of **piracy**, or robbery and depredation upon the high seas, is an offence against the universal law of society, a pirate being, according to Sir Edward Coke, *hostis humani generis*.[4] By the ancient common law piracy, if committed by a subject, was held to be a species of high treason, being contrary to his natural allegiance, and by an alien to be felony only; but now, since the statute

3. In the year 1654, during the protectorate of Cromwell, Don Pataleon Sa, the brother of the Portuguese ambassador, who had been joined with him in the same commission, was tried, convicted and executed, for an atrocious murder. Lord Hale, 1 P. C. 99, approves of the proceeding; and Mr. J. Foster, p. 188, though a modern writer of law, lays it down, that "for murder and other offences of great enormity, which are against the light of nature and the fundamental laws of all society, ambassadors are certainly liable to answer in the ordinary course of justice, as other persons offending in the like manner are;" but Mr. Hume observes upon this case, that "the laws of nations were here plainly violated." 7 vol. 237. And Vattel, with irresistible ability, contends that the universal inviolability of an ambassador is an object of much greater importance to the world than their punishment for crimes, however contrary to natural justice. "A minister," says that profound writer, "is often charged with a commission disagreeable to the prince to whom he is sent. If this prince has any power over him, and especially if his authority be sovereign, how is it to be expected that the minister can execute his master's orders with a proper freedom of mind, fidelity and firmness? It is necessary he should have no snares to fear, that he cannot be diverted from his functions by any chicanery. He must have nothing to hope, and nothing to fear, from the sovereign to whom he is sent. Therefore, in order to the success of his ministry, he must be independent of the sovereign's authority, and of the jurisdiction of the country both civil and criminal," (B. 4, c. 7, § 92), where this subject is discussed in a most luminous manner. The Romans, in the infancy of their state, acknowledged the expediency of the independence of ambassadors; for when they had received ambassadors from the Tarquin princes, whom they had dethroned, and had afterwards detected those ambassadors in secretly committing acts which might have been considered as treason against their state, they sent thm back unpunished; upon which Livy observes, *et quanquam visi sunt commississe, ut hostium loco essent, jus tamen gentium valuit.* Lib. 2, c. 4. When Bomilcar, *qui Roman fide publica venerat*, was prosecuted as an accomplice in the assassination of Massiva, Sallust declares, *fit reus magis ex aequo bonoque quam ex jure gentium.* Bell. Jug., c. 35.

4. An enemy of the human race.

of treason (25 Edw. III. c. 2), it is held to be only felony in a subject. The offence of piracy by common law consists in committing those acts of robbery and depredation upon the high seas which, if committed upon land, would have amounted to felony there. [72] But by statute some other offences are made piracy also.[5]

5. See the United States statutes; Clark's Crim. Law (2d Ed.), 411.

CHAPTER VI.

OF HIGH TREASON.

[By Art. 3, § 3, Const. U. S., treason against the United States can consist "only in levying war against them, or in adhering to their enemies, giving them aid and comfort;" and "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court."]

Every offence more immediately affecting the royal person, his crown or dignity, is in some degree a breach of the duty of allegiance, whether natural or innate, or local and acquired by residence; and these may be distinguished into four kinds: 1. Treason. [74] 2. Felonies injurious to the king's prerogative. 3. *Praemunire.* 4. Other misprisions and contempts. Of which crimes the first and principal is that of treason.

Treason (*proditio*) in its very name imports a betraying, treachery, or breach of faith. [75] It therefore happens only between allies, saith the Mirror, for treason is indeed a general appellation, made use of by the law to denote not only offences against the king and government, but also that accumulation of guilt which arises whenever a superior reposes a confidence in a subject or inferior, between whom and himself there subsists a natural, a civil, or even a spiritual relation, and the inferior so abuses that confidence, so forgets the obligations of duty, subjection, and allegiance, as to destroy the life of any such superior or lord.

And therefore for a wife to kill her lord or husband, a servant his lord or master, and an ecclesiastic his lord or ordinary, these, being breaches of the lower allegiance, of private and domestic faith, are denominated **petit treasons.** [Not law in the United States.]

But when disloyalty so rears its crest as to attack even majesty itself, it is called by way of eminent distinction **high treason** (*alta proditio*).

By the ancient common law there was a great latitude

left in the breasts of the judges to determine what was treason or not so, whereby the creatures of tyrannical princes had opportunity to create abundance of constructive treasons. But to prevent the inconveniences which began to arise from this multitude of constructive treasons, **the statute 25 Edw. III. c. 2,** was made, which defines what offences only for the future should be held to be treason. [76] This statute must therefore be our text and guide in order to examine into the several species of high treason. And we shall find that it comprehends all kinds of high treason under seven distinct branches.

1. "**When a man doth compass or imagine the death** of our lord the king, of our lady his queen, or of their eldest son and heir."

Under this description it is held that a queen regnant is within the words of the act, being invested with royal power, and entitled to the allegiance of her subjects; but the husband of such a queen is not comprised within these words, and therefore no treason can be committed against him. [77] The king here intended is the king in possession, without any respect to his title, for it is held that **a king de facto and not de jure,** or, in other words, an usurper that hath got possession of the throne, is a king within the meaning of the statute, as there is a temporary allegiance due to him for his administration of the government, and temporary protection of the public. But the most rightful heir of the crown, or king *de jure*[1] and not *de facto*,[2] who hath never had plenary possession of the throne, is not a king within this statute against whom treasons may be committed. And a very sensible writer on the crown law [1 Hawk. P. C. 36] carries the point of possession so far that he holds that a king out of possession is so far from having any right to our allegiance, by any other title which he may set up against the king in being, that we are bound by the duty of our allegiance to resist him,—a doctrine which he grounds upon the statute 11 Hen. VII. c. 1, which is declaratory of the common law, and pronounces all subjects excused from any penalty or forfeiture which do assist and obey a king *de facto*, The true distinction seems to be that the statute of Henry VII. does by no means *command* any opposition to a king *de jure*, but *excuses* the obedience paid to a king *de facto*. [78]

Lastly, a king who has resigned his crown, such resignation being admitted and ratified in parliament, is according to Sir Matthew Hale no longer the object of treason. And the same reason holds in case a king abdicates the government, or, by actions subversive of the constitution,

1. Of right.

2. In fact.

virtually renounces the authority which he claims by that very constitution.

Next, **what is a compassing or imagining** the death of the king, etc. These are synonymous terms, the word *compass* signifying the purpose or design of the mind or will, and not, as in common speech, the carrying such design to effect. And therefore an accidental stroke, which may mortally wound he sovereign, *per infortunium*, without any traitorous intent, is no treason. But as this compassing or imagining is an act of the mind, it cannot possibly fall under any judicial cognizance, unless it be demonstrated by some **open or overt act.** [79] And yet the tyrant Dionysius is recorded to have executed a subject barely for dreaming that he had killed him, which was held of sufficient proof that he had thought thereof in his waking hours. But in this and the three next species of treason it is necessary that there appear an open or *overt* act of a more full and explicit nature to convict the traitor upon. The statute expressly requires that the accused "be thereof upon sufficient proof attainted of some open act by men of his own condition." Thus, to provide weapons or ammunition for the purpose of killing the king is held to be a palpable overt act of treason in imagining his death. To conspire to imprison the king by force, and move towards it by assembling company, is an overt act of compassing the king's death. There is no question, also, but that taking any measures to render such treasonable purposes effectual, as assembling and consulting on the means to kill the king, is a sufficient overt act of high treason.

How far mere words spoken by an individual, and not relative to any treasonable act or design then in agitation, shall amount to treason, has been formerly matter of doubt. But now it seems clearly to be agreed that by the common law and the statute of Edward III. words spoken amount to only a high misdemeanor and no treason. [80] If the words be set down in writing, it argues more deliberate intention, and it has been held that writing is an overt act of treason, for *scribere est agere.* But even in this case the bare words are not the treason, but the deliberate act of writing them. And such writing, though unpublished, has in some arbitrary reigns convicted its author of treason. There was then no manner of doubt but that the publication of such a treasonable writing was a sufficient overt act of treason at the common law, though of late even that has been questioned. [81]

2. **The second species of treason is, "if a man do violate the king's companion, or the king's eldest daughter unmarried, or the wife of the king's eldest son and heir."**

By the king's companion is meant his wife, and by violation is understood carnal knowledge, as well without force as with it; and this is high treason in both parties, if both be consenting. To violate a queen or princess-dowager is held to be no treason.

3. **The third species of treason is, "if a man do levy war against our lord the king in his realm."**[3] And this may be done by taking arms, not only to dethrone the king, but under pretence to reform religion or the laws, or to remove evil counselors, or other grievances, whether real or pretended. To resist the king's forces by defending a castle against them is a levying of war; and so is an insurrection with an avowed design to pull down *all* inclosures, *all* brothels, and the like; the universality of the design making it a rebellion against the state, an usurpation of the powers of government, and an insolvent invasion of the king's authority. [82] But a tumult with a view to pull down a particular house or lay open a particular inclosure, amounts at most to a riot, this being no general defiance of public government. So if two subjects quarrel and levy war against each other (in that spirit of private war which prevailed all over Europe in the early feodal times), it is only a great riot and contempt, and no treason. A bare conspiracy to levy war does not amount to this species of treason, but (if particularly pointed at the person of the king or his government) it falls within the first, of compassing or imagining the king's death.

4. "**If a man be adherent to the king's enemies in his realm**, giving to them aid and comfort in the realm or elsewhere," he is also declared guilty of high treason. This must likewise be proved by some **overt act**, as by giving them intelligence, by sending them provisions, by selling them arms, by treacherously surrendering a fortress, or the like. [83] **By enemies** are here understood the subjects of foreign powers with whom we are at open war. As to foreign pirates or robbers, who may happen to invade our coasts without any open hostilities between their nation and our own, and without any commission from any prince or state at enmity with the crown of Great Britain, the

3. See quotations from the constitution of the United States at the beginning of this chapter.

See, also, Clark's Crim. Law (2d Ed.), 406. There may also be treason against a state. Id., 408. The state constitutions generally define the crime in the same terms as the constitution of the United States. Id., 406. In the absence of such definition the crime remains as at common law. Id.; Whart. Crim. Law, § 1812.

giving them any assistance is also clearly treason. And most indisputably, the same acts of adherence or aid which (when applied to foreign enemies) will constitute treason under this branch of the statute, will (when afforded to our own fellow-subjects in actual rebellion at home) amount to high treason under the description of levying war against the king. But to relieve a rebel fled out of the kingdom is no treason, for the statute is taken strictly, and a rebel is not an *enemy,* an enemy being always the subject of some foreign prince, and one who owes no allegiance to the crown of England. And if a person be under circumstances of actual force and constraint, through a well-grounded apprehension of injury to his life or person, this fear or compulsion will excuse his even joining with either rebels or enemies in the kingdom, provided he leaves them whenever he hath a safe opportunity.

5. **"If a man counterfeits the king's Great or Privy Seal,"** this is also high treason. But if a man take wax bearing the impression of the Great Seal off from one patent, and fixes it to another, this is held to be only an abuse of the seal, and not a counterfeiting of it.[4]

6. **The sixth species of treason under this statute is, "if a man counterfeit the king's money;** and if a man brings false money into the realm counterfeit to the money of England, knowing the money to be false to merchandise and make payment withal."[5] [84]

7. **The last species of treason ascertained by the statute is, "if a man slay the chancellor, treasurer, or the king's justices** of the one bench or the other, justices in eyre or justices of assise, and all other justices assigned to hear and determine, being in their places doing their offices." These high magistrates, as they represent the king's majesty during the execution of their offices, are therefore for the time equally regarded by the law. But this statute extends only to the actual killing of them, and not wounding, or a bare attempt to kill them. It extends also only to the officers therein specified.[6]

The new treasons created since the statute 1 Mar. c. 1 [which reduced all treasons since the statute of 25 Edw. III. to the standard of that statute], and not comprehended under the description of statute 25 Edw. III. are comprised under three heads. [87] 1. **Such as relate to papists.** 2. **Such as relate to falsifying the coin or other royal signatures.** 3. **Such as are created for the security of the Protestant succession** in the House of Hanover. [For particulars see text.]

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4. See the United States statutes.
5. See the United States statutes.
6. See the United States statutes.

The punishment of high treason in general is very solemn and terrible. 1. That the offender be drawn to the gallows, and not be carried or walk; though usually (by connivance, at length ripened by humanity into law) a sledge or hurdle is allowed, to preserve the offender from the extreme torment of being dragged on the ground or pavement. 2. That he be hanged by the neck, and then cut down alive. [93] 3. That his entrails be taken out and burned while he is yet alive. 4. That his head be cut off. 5. That his body be divided into four parts. 6. That his head and quarters be at the king's disposal.[7]

The king may, and often doth, discharge all the punishment except beheading, especially where any of noble blood are attainted. For beheading, being part of the judgment, that may be executed, though all the rest be omitted by the king's command. But where beheading is no part of the judgment, as in murder or other felonies, it hath been said that the king cannot change the judgment, although at the request of the party, from one species of death to another.

In the case of coining, which is a treason of a different complexion from the rest, the punishment is milder for male offenders, being only to be drawn and hanged by the neck till dead. But in treasons of every kind the punishment of women is the same, and different from that of men. Their sentence is to be drawn to the gallows, and there to be burned alive.

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7. The punishment of treason both in England and the United States is death. The barbarities described in the text are no longer inflicted.

CHAPTER VII.

OF FELONIES INJURIOUS TO THE KING'S PREROGATIVE.

Felony in the general acceptation of our English law, comprises every species of crime which occasioned at common law the **forfeiture of lands and goods.** [94] This most frequently happens in those crimes for which a capital punishment either is or was liable to be inflicted; for those felonies which are called clergyable, or to which the benefit of clergy extends, were anciently punished with death in all lay or unlearned offenders, though now by the statute law that punishment is for the first offence universally remitted. **All treasons,** strictly speaking, are felonies, though all felonies are not treason. [95] And to this also we may add that not only all offences now capital are in some degree or other felony, but that this is likewise the case with some other offences which are not punished with death, as suicide, where the party is already dead, homicide by chance-medley or in self-defence, and petit larceny or pilfering, — all which are (strictly speaking) felonies, as they subject the committers of them to forfeitures. So that upon the whole **the only adequate definition of felony** seems to be that which is before laid down, viz., an offence which occasions a total forfeiture of either lands or goods, or both, at the common law.[1]

Capital punishment does by no means enter into the true idea and definition of felony. [97] Felony may be without inflicting capital punishment, as in the cases instanced of self-murder, excusable homicide, and petit larceny; and it is possible that capital punishments may be inflicted and yet the offence be no felony, as in case of heresy by the common

1. Felony in this country is usually defined by statute to mean all offences which are punishable by death or imprisonment in the state's prison. It is so in California, Colorado, Illinois, Indiana, Iowa, Kentucky, Massachusetts, Michigan, New York, Tennessee, Virginia, Wisconsin and probably in others. See Washburn's Crim. Law (3d Ed.), 11, note; Clark's Crim. Law (2d Ed.), 40.

law, which, though capital, never worked any forfeiture of lands or goods, — an inseparable incident to felony. And of the same nature was the punishment of standing mute without pleading to an indictment, which at the common law was capital, but without any forfeiture, and therefore such standing mute was no felony. In short, the true criterion of felony is forfeiture; for, as Sir Edward Coke justly observes, in all felonies which are punishable with death the offender loses all his lands in fee-simple and also his goods and chattels; in such as are not so punishable, his goods and chattels only. The idea of felony is indeed so generally connected with that of capital punishment, that we find it hard to separate them; and to this usage the interpretations of the law do now conform. [98] And therefore if a statute makes any new offence felony, the law implies that it shall be punished with death, viz., by hanging as well as with forfeiture; unless the offender prays the benefit of clergy,[2] which all felons are entitled once to have, provided the same is not expressly taken away by statute.

The felonies which are more immediately injurious to the king's prerogative are: 1. Offences relating to the coin not amounting to treason. 2. Offences against the king's council. 3. The offence of serving a foreign prince. 4. The offence of embezzling or destroying the king's armor or stores of war. To which may be added a fifth, 5. Desertion from the king's armies in time of war. [The rest of this chapter is purely statutory, and inapplicable to this country.]

2. Now abolished.

CHAPTER VIII.

OF PRAEMUNIRE.

A third species of offence more immediately affecting the king and his government, though not subject to capital punishment, is that of *praemunire*, so called from the words of the writ preparatory to the prosecution thereof: "*praemunire* [for *praemoneri*] *facias A B*," cause A B to be forewarned that he appear before us to answer the contempt wherewith he stands charged,—which contempt is particularly recited in the preamble to the writ. It took its original from the exorbitant power claimed and exercised in England by the pope. [103]

The original meaning of the offence which we call praemunire is this, viz. introducing a foreign power into this land and creating *imperium in imperio*, by paying that obedience to papal process which constitutionally belonged to the king alone, long before the Reformation in the reign of Henry VIII. [115] The penalties of *praemunire* being pains of no inconsiderable consequence, it has been thought fit to apply the same to other heinous offences, some of which bear more and some less relation to this original offence, and some no relation at all. [116] [There being no such offence in this country as *praemunire*, the rest of this chapter is omitted.]

CHAPTER IX.

OF MISPRISIONS AND CONTEMPTS AFFECTING THE KING AND GOVERNMENT.

Misprisions (a term derived from the old French *mespris*, a neglect or contempt) are, in the acceptation of our law, generally understood to be all such high offences as are under the degree of capital, but nearly bordering thereon; and it is said that a misprision is contained in every treason and felony whatsoever, and that if the king so please the offender may be proceeded against for the misprison only. [119]

Misprisions are generally divided into two sorts: negative, which consist in the concealment of something which ought to be revealed, and **positive**, which consist in the commission of something which ought not to be done.

I. **Of the first, or negative kind**, is what is called **misprison of treason**,[1] consisting in the bare knowledge and concealment of treason without any degree of assent thereto; for any assent makes the party a principal traitor, as indeed the concealment, which was construed aiding and abetting, did at the common law. [120] But it is now enacted by the statute 1 & 2 Ph. & M. c. 10, that a bare concealment of treason shall be only held a misprision. This concealment becomes criminal if the party apprized of the treason does not, as soon as conveniently may be, reveal it to some judge of assise or justice of the peace.

Misprision of felony is also the concealment of a felony which a man knows, but never assented to; for if he assented, this makes him either principal or accessary.[2] [121]

There is also another species of negative misprisions, namely, the **concealing of treasure-trove**, which belongs to the king or his grantees by prerogative royal, the concealment of which was formerly punishable by death, but now only by fine and imprisonment.

1. An offence also against the United States. Rev. Stat. U. S., § 5333; Clark's Crim. Law (2d Ed.), 406.

2. This is a misdemeanor. Clark's Crim. Law (2d Ed.), 383.

II. **Misprisions which are merely positive** are generally denominated **contempts or high misdemeanors**, of which

1. The first and principal is the **mal-administration of** such high officers as are in public trust and employment. This is usually punished by the method of parliamentary impeachment.[3] Hitherto also may be referred the offence of **embezzling the public money.**[4] [122] With us it is not a capital crime, but subjects the committer of it to a discretionary fine and imprisonment. Other misprisions are, in general, such contempts of the executive magistrate as demonstrate themselves by some arrogant and undutiful behavior toward the king and government. There are

2. **Contempts against the king's prerogative.** As by refusing to assist him for the good of the public, either in his councils by advice if called upon, or in his wars by personal service for defence of the realm against a rebellion or invasion. Under which class may be ranked the neglecting to join the *posse comitatus,* or power of the county, being thereunto required by the sheriff or justices according to the statute 2 Hen. V. c. 8, which is a duty incumbent upon all that are fifteen years of age, under the degree of nobility, and able to travel. Contempts against the prerogative may also be by preferring the interests of a foreign potentate to those of their own, or doing or receiving anything that may create an undue influence in favor of such extrinsic power, — as by taking a pension from any foreign prince without the consent of the king; or by disobeying the king's lawful commands, whether by writs issuing out of his courts of justice, or by a summons to attend his privy council, or by letters from the king to a subject commanding him to return from beyond seas (for disobedience to which his lands shall be seized till he does return, and himself afterwards punished), or by his writ of *ne excat regnum,*[5] or proclamation commanding the subject to stay at home, — disobedience to any of these commands is a high misprision and contempt.

3. See U. S. Const., art. 2, sec. 4.

4. See the state and federal statutes; also the several state constitutions.

5. That he depart not from the kingdom.

And so, lastly, is disobedience to any act of parliament where no particular penalty is assigned; for then it is punishable, like the rest of these contempts,[6] by fine and imprisonment at the discretion of the king's courts of justice. [123]

3. **Contempts and misprisions against the king's person and government** may be by speaking or writing against them, cursing or wishing him ill, giving out scandalous stories concerning him, or doing anything that may tend to lessen him in the esteem of his subjects, may weaken his government, or may raise jealousies between him and his people.

4. **Contempts against the king's title,** not amounting to treason or *praemunire,* are the denial of his right to the crown in common and unadvised discourse; for if it be by advisedly speaking, it amounts to a *praemunire.*

5. **Contempts against the king's palaces or courts of justice** have been always looked upon as high misprisions.

And by the ancient law, before the Conquest, fighting in the king's palace or before the king's judges was punished with death. [124] And at present with us, by the statute 33 Hen. VIII. c. 12, **malicious striking in the king's palace,** wherein his royal person resides, whereby blood is drawn, is punishable by perpetual imprisonment and fine at the king's pleasure, and also with loss of the offender's right hand, the solemn execution of which sentence is prescribed in the statute at length. [125]

But striking in the king's superior courts of justice, in Westminster Hall or at the assises, is made still more penal than even in the king's palace. A stroke or blow in such a court of justice, whether blood be drawn or not, or even assaulting a judge sitting in the court, by drawing a weapon without any blow struck, is punishable with the loss of the right hand, imprisonment for life, and forfeiture of goods and chattels, and of the profits of his lands during life. **A rescue,** also, of a prisoner from any of the said courts without striking a blow is punished with perpetual imprisonment, and forfeiture of goods and of the profits of lands during life. For the like reason, **an affray** or riot

6. Which are misdemeanors and not felonies. See the statutes.

near the said courts, but out of their actual view, is punished only with fine and imprisonment.

Not only such as are guilty of an actual violence, but of **threatening or reproachful words to any judge** sitting in the courts, are guilty of a high misprision, and have been punished with large fines, imprisonment, and corporal punishment. [126] And even in the inferior courts of the king an affray or contemptuous behavior is punishable with a fine by the judges there sitting.

Likewise, all such as are guilty of any **injurious treatment to those who are immediately under the protection of a court** of justice are punishable by fine and imprisonment: as if a man assaults or threatens his adversary for suing him, a counselor or attorney for being employed against him, a juror for his verdict, or a gaoler or other ministerial officer for keeping him in custody and properly executing his duty.

Lastly, **to endeavor to dissuade a witness** from giving evidence, to disclose an examination before the privy council, or to advise a prisoner to stand mute (all of which are impediments of justice), are high misprisions and contempts of the king's courts, and punishable by fine and imprisonment. And anciently it was held that if one of the grand jury disclosed to any person indicted the evidence that appeared against him he was thereby made accessory to the offence, if felony, and in treason a principal. And at this day it is agreed that he is guilty of a high misprision, and liable to be fined and imprisoned.[7]

7. "The power of punishing for contempt is incident to all courts having jurisdiction to try causes, as well as to deliberative bodies acting in matters of government, like houses of parliament and houses of Congress." Washburn's Crim. Law (3d Ed.), *247; Cooley's Const. Lim. (7th Ed.), 191-193. Cases of contempt were never triable by jury. Cooley's Const. Lim. (7th Ed.), 453, note. See, also, People v. Wilson, 64 Ill. 195 (libel upon Supreme Court punished as a contempt); Storey v. People, 79 id. 45.

CHAPTER X.

OF OFFENCES AGAINST PUBLIC JUSTICE.

The crimes and misdemeanors that more especially affect the commonwealth may be divided into five species, viz., offences against public *justice,* against the public *peace,* against public *trade,* against the public *health,* and against the public *police* or *economy.* [128]

First, **of offences against public justice,** some of which are felonious, whose punishment may extend to death; others only misdemeanors. I shall begin with those that are most penal, and descend gradually to such as are of less malignity.

1. **Embezzling or vacating records,** or falsifying certain other proceedings in a court of judicature, is [by statute] a felonious offence against public justice.[1]

2. To prevent abuses by the extensive power which the law is obliged to repose in **gaolers,** it is nacted by statute 14 Edw. III. c. 10, that if any *gaoler* by too great duress of imprisonment makes any prisoner that he hath in ward become an *approver* or an *appellor* against his will,—that is, as we shall see hereafter, to accuse and turn evidence against some other person,—it is felony in the gaoler. [129] [Repealed.]

3. A third offence against public justice is **obstructing the execution of lawful process.**[2] This is at all times an offence of a very high and presumptious nature, but more particularly so when it is an obstruction of an arrest upon criminal process. And it hath been holden that the party opposing such arrest becomes thereby *particeps criminis,*— that is, an accessory in felony, and a principal in high treason.

4. **An escape** of a person arrested upon criminal process by eluding the vigilance of his keepers before he is put in hold, is also an offence against public justice, and the party himself is punishable by fine or imprisonment. [130] But the officer permitting such escape, either by negligence or

1. Consult the local statutes.

2. This is made a matter of statutory regulation in the several states. Consult the statutes.

connivance, is much more culpable than the prisoner. Officers, therefore, who after arrest *negligently* permit a felon to escape, are also punishable by fine. But *voluntary* escapes, by consent and connivance of the officer, are a much more serious offence; for it is generally agreed that such escapes amount to the same kind of offence, and are punishable in the same degree as the offence of which the prisoner is guilty and for which he is in custody, whether treason, felony, or trespass — and this whether he were actually committed to gaol, or only under a bare arrest.[3] But the officer cannot be thus punished till the original delinquent hath actually received judgment or been attainted upon verdict, confession, or outlawry of the crime for which he was so committed or arrested. But before the conviction of the principal party the officer thus neglecting his duty may be fined and imprisoned for a misdemeanor.

5. **Breach of prison by the offender** himself when committed for any cause was felony at the common law, or even conspiring to break it.[4] But this severity is mitigated by the statute *de frangentibus prisonam,* 1 Edw. II., which enacts that no person shall have judgment of life or member for breaking prison unless committed for some capital offence; so that to break prison and escape when lawfully committed for any treason or felony remains still felony as at the common law; and to break prison (whether it be the county gaol, the stocks, or other usual place of security) when lawfully confined upon any other inferior charge, is still punishable as a high misdemeanor by fine and imprisonment. [131]

6. **Rescue** is the forcibly and knowingly freeing another from an arrest or imprisonment; and it is generally the same offence in the stranger so rescuing as it would have been in a gaoler to have *voluntarily* permitted an escape. A rescue, therefore, of one apprehended for felony is felony; for treason, treason; and for a misdemeanor, a misdemeanor also.[5] But here likewise, as upon voluntary escapes, the principal must first be attainted or receive judgment before

3. Clark's Crim. Law (2d Ed.), 381.

4. Id., 382.

5. Id., 383.

the rescuer can be punished; and for the same reason, because perhaps in fact it may turn out that there has been no offence committed.

7. Another capital offence against public justice is the **returning from transportation,** or being seen at large in Great Britain before the expiration of the term for which the offender was ordered to be transported, or had agreed to transport himself. [132]

8. An eighth is that of **taking a reward under pretence of helping the owner to his stolen goods:** to prevent which audacious practice, it was enacted by statute 4 Geo. I. c. II, that whoever shall take a reward under the pretence of helping any one to stolen goods shall suffer as the felon who stole them, unless he causes such principal felon to be apprehended and brought to trial, and also gives evidence against him.

9. **Receiving of stolen goods, knowing them to be stolen,** is also a high misdemeanor and affront to public justice.[6] This offence, which is only a misdemeanor at common law, by the statute 3 & 4 W. & M. c. 9, and 5 Anne, c. 31, makes the offender accessary to the theft and felony. But because the accessary cannot in general be tried unless with the principal or after the principal is convicted, the receivers by that means frequently eluded justice. [133] To remedy which, it is enacted by statute 1 Anne, c. 9, and 5 Anne, c. 31, that such receivers may still be prosecuted for a misdemeanor, and punished by fine and imprisonment, though the principal felon be not before taken so as to be prosecuted and convicted. So that now the prosecutor has two methods in his choice: either to punish the receivers for the misdemeanor immediately, before the thief is taken, or to wait till the felon is convicted, and then punish them as accessaries to the felony. But it is provided by the same statutes that he shall only make use of one, and not both of these methods of punishment.

10. Of a nature somewhat similar to the two last is the

6. This is now made a substantive crime by statute in probably all the states. To constitute the offence the property must have been stolen when received; it must have come into the possession of the receiver with the consent of the person from whom received; the receiver must know that it was stolen and must have a felonious intent. Clark's Crim. Law (2d Ed.), 327. See Wash. Crim. Law (3d Ed.), 66 and cases cited.

offence of **theft bote**, which is where the party robbed not only knows the felon, but also takes his goods again, or other amends upon agreement not to prosecute. This is frequently called **compounding of felony**,[7] and formerly was held to make a man an accessary; but it is now punished only with fine and imprisonment.

11. **Common barratry** is the offence of frequently exciting and stirring up suits and quarrels between his Majesty's subjects, either at law or otherwise.[8] [134] The punishment for this offence, in a common person, is by fine and imprisonment; but if the offender (as is too frequently the case) belongs to the profession of the law, a barrator, who is thus able as well as willing to do mischief, ought also to be disabled from practising for the future. Hereunto may also be referred another offence of equal malignity and audaciousness, that of **suing another in the name of a fictitious plaintiff**, either one not in being at all, or one who is ignorant of the suit. This offence, if committed in any of the king's superior courts, is left, as a high contempt, to be punished at their discretion. But in courts of a lower degree, where the crime is equally pernicious but the authority of the judges not equally extensive, it is directed by statute 8 Eliz. c. 2, to be punished by six months' imprisonment and treble damages to the party injured.

12. **Maintenance** is an offence that bears a near relation to the former, being an officious intermeddling in a suit that no way belongs to one, by maintaining or assisting either party, with money or otherwise, to prosecute or defend it.[9] A man may, however, maintain the suit of his near kinsman, servant, or poor neighbor, out of charity and compassion, with impunity. [135] Otherwise, the punishment by common law is fine and imprisonment, and by the statute 32 Hen. VIII. c. 9, a forfeiture of 10*l.*

13. **Champerty**,[1] *campi-partitio,* is a species of mainte-

7. Com. v. Pease, 16 Mass. 91; Clark's Crim. Law (2d Ed.), 383. It is a misdemeanor at common law. Id., 383.

8. Clark's Crim. Law, 376; Com. v. Davis, 11 Pick. 433.

9. 1 Hawk. Pl. Cr., ch. 83, sec. 1; Rev. Stat. Ill. (1874), 355, § 27; Moore's Crim. Law, § 238.

1. Clark's Crim. Law, 376; Wash. Crim. Law, 29. Champerty is a misdemeanor at common law. Lathrop

nance, and punished in the same manner, being a bargain with a plaintiff or defendant *campum partire,* to divide the land or other matter sued for between them if they prevail at law, whereupon the champertor is to carry on the party's suit at his own expense. In our sense of the word it signifies the purchasing of a suit or right of suing,— a practice so much abhorred by our law that it is one main reason why a *chose* in action, or thing of which one hath the right but not the possession, is not assignable at common law, because no man should purchase any pretence to sue in another's right. Hitherto also must be referred the provision of the statute 32 Hen. VIII. c. 9, that no one shall sell or purchase any pretended right or title to land, unless the vendor hath received the profits thereof for one whole year before such grant, or hath been in actual possession of the land, or of the reversion or remainder.[2] [136] These offences relate chiefly to the commencement of *civil* suits; but

14. The **compounding of informations** upon penal statutes is an offence of an equivalent nature in *criminal* causes, and is besides an additional misdemeanor against public justice by contributing to make the laws odious to the people. At once, therefore, to discourage malicious informers and to provide that offences when once discovered shall be duly prosecuted, it is enacted by statute 18 Eliz. c. 5, that if any person, informing under pretence of any penal law, makes any composition without leave of the court, or takes any money or promise from the defendant to excuse him (which demonstrates his intent in commencing the prosecution to be merely to serve his own ends, and not for the public good), he shall forfeit 10*l.*, shall stand two hours on the pillory, and shall be forever disabled to sue on any popular or penal statute.[3]

15. **A conspiracy**[4] **also to indict an innocent man of fel-**

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v. Amherst Bank, 9 Met. 490; Thompson v. Reynolds, 73 Ill. 1. In Iowa, Michigan, Ohio, New Jersey, Massachusetts and Vermont it is not (as it seems) a criminal offence. See Wash. Crim. Law (3d Ed.), 29, 30, and notes. Consult the local statutes.

2. Prohibited by statute in some states. Consult the statutes.

3. See the local statutes.

4. Dr. McLain in his work on Criminal Law, § 953, well defines conspiracy as "a combination of two or more persons by concerted action to

ony falsely and maliciously, who is accordingly indicted and acquitted, is a farther abuse and perversion of public justice, for which the party injured may either have a civil action by writ of conspiracy, or the conspirators, for there must be at least two to form a conspiracy, may be indicted at the suit of the king, and were by the ancient common law to receive what is called the *villenous* judgment, viz., to lose their *liberam legem,* whereby they are discredited and disabled as jurors or witnesses; to forfeit their goods and chattels and lands for life; to have those lands wasted, their houses razed, their trees rooted up, and their own bodies committed to prison. But it now is the better opinion that the villenous judgment is by long disuse become obsolete, it not having been pronounced for some ages, but instead thereof the delinquents are usually sentenced to imprisonment, fine, and pillory. [137] To this head may be referred the offence of **sending letters threatening to accuse any person of a crime** punishable with death, transportation, pillory, or other infamous punishment, with a view to extort from him any money or other valuable chattels. This is punishable by statute 30 Geo. II. c. 24,[5] at the discretion of the court, with fine, imprisonment, pillory, whipping, or transportation for seven years.

16. The next offence against public justice is the crime of wilful and corrupt **perjury,** which is defined by Sir Edward Coke to be a crime committed when a **lawful oath** is administered, in some **judicial proceeding,** to a person who **swears wilfully, absolutely, and falsely,** in a matter **material** to the issue or point in question.[6] The law takes

accomplish a criminal or unlawful purpose, or some purpose not in itself criminal, by criminal or unlawful means." See, also, 2 Bish. Crim. Law (7th Ed.), § 171; 3 Greenl. Evid., § 89; Clark's Crim. Law, 142; Spies v. People, 122 Ill. 1. The gist of the crime is in the unlawful combination and no farther overt act is necessary. It cannot be committed by less than two persons. It cannot, therefore, be committed by husband and wife alone. Clark's Crim. Law (2d Ed.), 142, 143 and notes. In some states the offence is defined by statute. See Wash. Crim. Law (3d Ed.), 41 and local statutes.

5. Consult the federal and state statutes.

6. Clark's Crim. Law, 385; 3 Greenl. Ev., § 188; Rev. Stat. Ill. 1874, 387, § 225; 2 Comp. Laws Mich. 1871, § 7654; Code Iowa 1873, §

no notice of any perjury but such as is committed in some court of justice having power to administer an oath, or before some magistrate or proper officer invested with a similar authority, in some proceedings relative to a civil suit or a criminal prosecution. The perjury must also be corrupt (that is, committed *malo animo*), wilful, positive, and absolute; not upon surprise or the like; it also must be in some point material to the question in dispute. [It was a misdemeanor at common law.]

Subornation of perjury is the offence of procuring another to take such a false oath as constitutes perjury in the principal.[7] [138] The punishment of perjury and subornation at common law has been various. It was anciently death, afterwards banishment or cutting out the tongue, then forfeiture of goods, and now it is fine and imprisonment and never more to be capable of bearing testimony. But the statute 5 Eliz. c. 9 (if the offender be prosecuted thereon), inflicts the penalty of perpetual infamy and a fine of 40*l.* on the suborner, and in default of payment, imprisonment for six months, and to stand with both ears nailed to the pillory. Perjury itself is thereby punished with six months' imprisonment, perpetual infamy, and a fine of 20*l.*, or to have both ears nailed to the pillory. But the prosecution is usually carried on for the offence at common law.

3936; Rev. Stat. N. Y., pt. 4, ch. 1, tit. 4, § 1. An extra-judicial oath does not constitute perjury. 2 Bish. Crim. Law (4th Ed.), §§ 984, 991, 992; Wash. Crim. Law (3d Ed.), 89 and cases cited.

As to the form of administering the oath, see the leading case of Omichund v. Barker, Willes, 538; 1 Smith Lead. Cas. 535 (the witnesses in this case professed the Gentoo religion and were sworn according to its forms).

The false testimony must be wilful and corrupt. Clark's Crim. Law, 387; State v. Hascall, 6 N. H. 352.

The testimony must also be material to the issue or matter of inquiry. Clark's Crim. Law, 388; Wood v. People, 59 N. Y. 117.

Where the crime is defined by statute, as it frequently is, the elements of the offence are substantially the same; not unfrequently extra-judicial false swearing is made perjury by statute. Consult the local statutes.

Perjury cannot be committed jointly by several persons, though it is said one may be charged with perjury and another with subornation in the same indictment. Com. v. Devine, 155 Mass. 224.

7. See Clark's Crim. Law (2d Ed.), 385. This is an offence at common law and usually also by statute.

17. **Bribery**[8] is the next species of offence against public justice, which is when a judge or other person concerned in the administration of justice takes any undue reward to influence his behavior in his office. [139] In England this offence of taking bribes is punished, in inferior officers, with fine and imprisonment, and in those who offer a bribe, though not taken, the same. [140] But in judges, especially the superior ones, it hath been always looked upon as so heinous an offence, that the Chief Justice Thorpe was hanged for it in the reign of Edward III. By a statute, 11 Hen. IV., all judges and officers of the king convicted of bribery shall forfeit treble the bribe, be punished at the king's will, and be discharged from the king's service forever.

18. **Embracery** is an attempt to influence a jury corruptly to one side by promises, persuasions, entreaties, money, entertainments, and the like.[9] The punishment for the person embracing is by fine and imprisonment, and for the juror so embraced, if it be by taking money, the punishment is (by divers statutes of the reign of Edward III.), perpetual infamy, imprisonment for a year, and forfeiture of the tenfold value.

19. **The false verdict of jurors,** whether occasioned by embracery or not, was anciently considered as criminal, and therefore exemplarily punished by attaint in the manner formerly mentioned. [Obsolete.]

20. Another offence of the same species is the **negligence of public officers** intrusted with the administration of justice, as sheriffs, coroners, constables, and the like, which makes the offender liable to be fined, and in very notorious cases will amount to a forfeiture of his office if it be a beneficial one.

Wash. Crim. Law (3d Ed.), 92; McClain's Crim. Law, § 893.

8. Bribery may be committed by either giving or receiving a reward to influence an official act, whether of a judicial or other officer. Clark's Crim. Law (2d Ed.), 389; 2 Bish. New Crim. Law, § 85; McClain's Crim. Law, § 896. It suffices that the officer be *de facto* and not *de jure*. State v. Gardener, 53 Ohio St. 145. The offence is usually defined by statute.

9. Clark's Crim. Law, 380; People v. Myers, 70 Cal. 582, and local statutes.

This offence in practice is usually punished as a contempt.

21. There is yet another offence against public justice which is a crime of deep malignity. [141] This is the **oppression and tyrannical partiality of judges**, justices, and other *magistrates*, in the administration and under the color of their office. However, when prosecuted, either by impeachment in parliament or by information in the Court of King's Bench (according to the rank of the offenders), it is sure to be severely punished with forfeiture of their offices (either consequential or immediate), fines, imprisonment, or other discretionary censure, regulated by the nature and aggravations of the offence committed.

22. Lastly, **extortion** is an abuse of public justice which consists in any officer's unlawfully taking, by color of his office, from any man any money or thing of value that is not due to him, or more than is due or before it is due. The punishment is fine and imprisonment, and sometimes a forfeiture of the office.[1]

1. Usually regulated by express statute.

CHAPTER XI.

OF OFFENCES AGAINST THE PUBLIC PEACE.

These offences are either such as are an actual breach of the peace, or constructively so by tending to make others break it. [142] Both of these species are also either felonious or not felonious. The felonious breaches of the peace are strained up to that degree of malignity by virtue of several modern statutes, and particularly,

[1. **The riotous assembling of twelve persons** or more, and not dispersing upon proclamation; 2. **Unlawful hunting in disguise;** 3. **Knowingly to send any letter without a name, or with a fictitious name, demanding money, venison,** or any other valuable thing, or threatening (without any demand) to kill any of the king's subjects, or to fire their houses, etc.; 4. **To pull down or destroy any lock, sluice, or floodgate** erected by authority of parliament on a navigable river; or maliciously to pull down or otherwise destroy any turnpike-gate or fence, toll-house or weighing-engine thereunto belonging, erected by authority of parliament, etc.; were respectively felonies by statute.]

The remaining offences against the public peace are merely **misdemeanors,** and not felonies; as

5. **Affrays** (from *affraier,* to terrify) are the fighting of two or more persons in some public place, to the terror of his majesty's subjects;[1] for if fighting be in private, it is no *affray,* but an *assault.* [145] Affrays may be suppressed by any private person present, who is justifiable in endeavoring to part the combatants, whatever consequence may ensue. But more especially the constable or other similar officer, however denominated, is bound to keep the peace, and to that purpose may break open doors to suppress an affray or apprehend the affrayers, and may either carry them before a justice or imprison them by his own authority for a convenient space till the heat is over, and may then perhaps also make them find sureties for the peace. The

1. Clark's Crim. Law, 398. It is a misdemeanor at common law. Id.

punishment of common affrays is by fine and imprisonment. **Two persons** may be guilty of an affray;[2] but

6. **Riots, routs, and unlawful assemblies** must have *three* persons at least to constitute them.[3] [146] An **unlawful assembly** is when three or more do assemble themselves together to do an unlawful act, as to pull down enclosures, to destroy a warren or the game therein, and part without doing it, or making any motion towards it.[4] A **rout** is where three or more meet to do an unlawful act upon a common quarrel, as forcibly breaking down fences upon a right claimed of common or of way, and make some advances towards it.[5] A **riot** is where three or more actually do an unlawful act of violence, either with or without a common cause or quarrel, as if they beat a man; or hunt and kill game in another's park, chase, warren, or liberty; or do any other unlawful act with force and violence; or even do a lawful act, as removing a nuisance in a violent and tumultuous manner.[6]

7. Nearly related to this head of riots is the offence of **tumbulnous petitioning,** which was carried to an enormous height in the times preceding the Grand Rebellion. [147] Wherefore by statute 13 Car. II. st. 1, c. 5, it is enacted that not more than twenty names shall be signed to any petition to the king or either house of parliament for any alteration of matters established by law in church or state, unless the contents thereof be previously approved, in the country by three justices or the majority of the grand jury at the assises or quarter-sessions, and in London by the Lord Mayor, aldermen, and Common Council, and that no petition shall be delivered by a company of more than ten persons, on pain in either case of incurring a penalty not exceeding 100*l.* and three months' imprisonment. [148]

8. An eighth offence against the public peace is that of a **forcible entry or detainer,** which is committed by violently taking or keeping possession of lands and tenements, with

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2. One person alone cannot commit it. Id.

3. Clark's Crim. Law, 395 and cases cited.

4. Id.

5. Id.; State v. Sumner, 2 Speers, 599.

6. Clark's Crim. Law, 395-397; State v. Brazil, Rice (S. C.), 257; State v. Snow, 18 Me. 346; Green v. State, 109 Ga. 536.

menaces, force, and arms, and without the authority of law.[7] This was formerly allowable to every person disseised or turned out of possession, unless his entry was taken away or barred by his own neglect or other circumstances. But the entry now allowed by law is a peaceable one, that forbidden is such as carried on and maintained with force, with violence and unusual weapons. By the statute 5 Ric. II. st. 1, c. 8, all forcible entries are punished with imprisonment and ransom at the king's will. And by the several statutes of 15 Ric. II. c. 2, 8 Hen. VI. c. 9, 31 Eliz. c. 11, and 21 Jac. I. c. 15, upon any forcible entry or forcible detainer after peaceable entry into any lands or benefices of the church, one or more justices of the peace, taking sufficient power of the county, may go to the place, and there record the force upon his own view, as in case of riots, and upon such conviction may commit the offender to gaol till he makes fine and ransom to the king. And moreover the justice or justices have power to summon a jury to try the forcible entry or detainer complained of, and if the same be found by that jury, then, besides the fine on the offender, the justices shall make **restitution by the sheriff of the possession, without inquiring into the merits of the title,** for the force is the only thing to be tried, punished, and remedied by them; and the same may be done by indictment at the general sessions. But this provision does not extend to such as endeavor to maintain possession by force, where they themselves or their ancestors have been in the peaceable enjoyment of the lands and tenements for three years immediately preceding. [149]

9. The offence of **riding or going armed with dangerous or unusual weapons**[8] is a crime against the public peace, by terrifying the good people of the land, and is particularly prohibited by the statute of Northampton, 2 Edw. III. c. 3,

7. Clark's Crim. Law (2d Ed.), 399 and cases cited; Wash. Crim. Law (3d Ed.), 51 and cases cited.

Forcible entry and detainer, while offences at common law, are in this country usually made crimes by statute.

8. As to the right to bear arms, see Cooley's Const. Lim. (7th Ed.), 498, 499 and notes. By the weight of authority statutes prohibiting the carrying of concealed weapons are constitutional. Id., 499, note.

upon pain of forfeiture of the arms, and imprisonment during the king's pleasure.

10. **Spreading false news,** to make discord between the king and nobility, or concerning any great man of the realm, is punishable by common law with fine and imprisonment, which is confirmed by statutes Westm. 1, 3 Edw. I. c. 34, 2 Ric. II. st. 1, c. 5, and 12 Ric. II. c. 11.

11. **False and pretended prophecies,** with intent to disturb the peace, are equally unlawful and more penal, as they raise enthusiastic jealousies in the people, and terrify them with imaginary fears. Such false and pretended prophecies were punished capitally by statute 1 Edw. VI. c. 12, which was repealed in the reign of Queen Mary. And now by the statute of 5 Eliz. c. 15, the penalty for the first offence is a fine of ten pounds and one year's imprisonment; for the second, forfeiture of all goods and chattels, and imprisonment during life.

12. **Besides actual breaches of the peace, anything that tends to provoke or excite others to break it is an offence** of the same denomination. [150] Therefore **challenges to fight** either by word or letter, or to be the bearer of such challenge, are punishable by fine and imprisonment according to the circumstances of the offence.[9]

13. Of a nature very similar to challenges are **libels,**[1] *libelli famosi,* which, taken in their largest and most extensive sense, signify any writings, pictures, or the like, of an immoral or illegal tendency, but, in the sense under which we are now to consider them, are malicious defamations of any person, and especially a magistrate, made public by either printing, writing, signs, or pictures, in order to provoke him to wrath or expose him to public hatred, contempt, and ridicule.[2] The direct tendency of these libels

9. Clark's Crim. Law, 394. No actual fighting is necessary. Id.

Usually made statutory offences in this country.

1. Civil actions for libel have already been considered *ante.*

2. Clark's Crim. Law (2d Ed.), 400.

Publication is necessary to constitute criminal libel. Id.; Swindle v. State, 2 Yerg (Tenn.), 581.

Publication of defamatory matter concerning a dead person is a libel if calculated to bring living people into hatred, contempt or ridicule, but not otherwise. Rex v. Topham, 4

is the breach of the public peace, by stirring up the objects of them to revenge, and perhaps to bloodshed. The communication of a libel to any one person is a publication in the eye of the law, and therefore the sending an abusive letter to a man is as much a libel as if it were openly printed, for it equally tends to a breach of the peace. For the same reason it is immaterial with respect to the essence of a libel whether the matter of it be true or false, since the provocation and not the falsity is the thing to be punished criminally, though, doubtless, the falsehood of it may aggravate its guilt and enhance its punishment. In a civil action a libel must appear to be false as well as scandalous. But in a criminal prosecution, the tendency which all libels have to create animosities, and to disturb the public peace, is the whole that the law considers. [151] And therefore in such prosecutions the only points to be inquired into are, first, the making or publishing of the book or writing, and, secondly, whether the matter be criminal; and if both these points are against the defendant, the offence against the public is complete.[3]

In this and the other instances which we have lately considered, where blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels are punished by the English law, **the liberty of the press**, properly understood, is by no means infringed or violated. The liberty of the press consists in laying no *previous* restraints upon publications, and not in freedom from censure for criminal matter when published. [152] Every freeman has an undoubted

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Term. Rep. 126; Clark's Crim. Law, 400.

Malice is necessary, but may be inferred from the fact of publication. Clark's Crim. Law, 404; Com. v. Blanding, 3 Pick 304.

As to what communications are privileged, see Clark's Crim. Law, 402; Cooley's Const. Lim. (7th Ed.), 609, 611, 616-636.

At common law the rule was: the greater the truth, the greater the libel; but now the general rule in the United States is that in a criminal prosecution for libel, the truth is a defence when published with a good motive and for a justifiable end; substantially the same rule now prevails in England. Cooley's Const. Lim. (7th Ed.), 656.

3. The rule at common law was changed by Mr. Fox's Libel Act. See Cooley's Const. Lim. (7th Ed.), 652-655.

right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous, or illegal, he must take the consequences of his own temerity.[4] To subject the press to the restrictive power of a **licenser**, as was formerly done both before and since the Revolution, is to subject all freedom of sentiment to the prejudices of one man, and make him the arbitrary and infallible judge of all controverted points in learning, religion, and government. But to punish (as the law does at present) any dangerous or offensive writings, which, when published, shall on a fair and impartial trial be adjudged of a pernicious tendency, is necessary for the preservation of peace and good order, of government and religion,— the only solid foundations of civil liberty. Thus the will of individuals is still left free, the abuse only of that free-will is the object of legal punishment. [The press became properly free in 1694, and has ever since so continued.]

4. For a learned and exhaustive discussion of liberty of speech and of the press, with a full citation of authorities, see Cooley's Const. Lim. (7th Ed.), 596. Every student should read this chapter, if no more, of this learned and useful treatise.

CHAPTER XII.

OF OFFENCES AGAINST PUBLIC TRADE.

Offences against public *trade*, like those of the preceding classes, are either felonious or not felonious. [154] Of the first sort are,

1. **Owling**, so called from its being usually carried on in the night, which is the offence of transporting wool or sheep out of this kingdom, to the detriment of its staple manufacture. This was forbidden at common law, and more particularly by statute 11 Edw. III. c. 1, when the importance of our woollen manufacture was first attended to, and there are now many later statutes relating to this offence. [Repealed.]

2. **Smuggling**, or the offence of importing goods without paying the duties imposed thereon by the laws of the customs and excise, is an offence generally connected and carried on hand in hand with the former. [155] This is restrained by a great variety of statutes, which inflict pecuniary penalties and seizure of the goods for clandestine smuggling, and affix the guilt of felony, with transportation for seven years, upon more open, daring, and avowed practices.[1]

3. Another offence against public trade is **fraudulent bankruptcy.**[2] [156]

4. **Usury**, which is an unlawful contract upon the loan of money to receive the same again with exorbitant increase.

5. **Cheating** is another offence more immediately against public trade. [157] Hither may be referred that prodigious multitude of statutes which are made to restrain and punish deceits in particular trades, and which are enumerated by Hawkins and Burn, but are chiefly of use among the traders themselves. The offence of selling by *false weights and measures* is reducible to this head of cheating.[3]

1. This is an offence against the United States. See the federal statutes.

2. See, generally, Collier on Bankruptcy, 10th Ed. 1914.

3. The subject of usury is in this

Now the general punishment for all frauds of this kind, if indicted (as they may be) at common law, is by fine and imprisonment. [158] Lastly, any deceitful practice in cozening another by artful means, whether in matters of trade or otherwise, as by playing with false dice, or the like, is punishable with fine, imprisonment, and pillory. And by the statutes 33 Hen. VIII. c. 1, and 30 Geo. II. c. 4, if any man defrauds another of any valuable chattels by color of any false token, counterfeit letter, or **false pretence,**[4] or pawns or disposes of another's goods without the consent of the owner, he shall suffer such punishment by imprisonment, fine, pillory, transportation, whipping, or other corporal pain, as the court shall direct.

6. The offence of **forestalling the market** is also an offence against public trade. This, which (as well as the two fol-

country entirely statutory; and a great diversity of provisions exists. The taking of usury is not generally made a criminal offence, though in some states it is a misdemeanor. Consult the local statutes.

4. "Cheating by use of false weights or false measures is indictable at common law. So, if done by false tokens, which were some real visible marks or things such as a key or ring, made use of before the general use of written orders, to indicate that the person possessing it may be trusted as coming from the owner of such token." Washburn's Crim. Law (3d Ed.), 37, 38; Com. v. Warren, 6 Mass. 72. "But obtaining goods by false pretences is not an offence at common law." Wash. Crim. Law, 38, citing Com. v. Call, 21 Pick. 520. See, generally, Clark's Crim. Law (2d Ed.), 314, 316.

Obtaining goods by mere false pretences not being indictable at common law, statutes have been enacted probably in all the states remedying this defect of the common law. Clark's Crim. Law (2d Ed.), 316.

The offence is generally defined as "the knowingly and designedly obtaining of the property of another by false pretences, with the intent to defraud Id. The pretence must be a false representation as to some past or existing fact and not a mere expression of opinion or a promise. The pretence must be knowingly false, made with intent and to some extent calculated to defraud and it must in fact deceive and defraud. The person defrauded must not be guilty of gross carelessness. All the circumstances and the intelligence of the person defrauded are to be considered. Mere credulity on the part of the person defrauded is not a defence. See the whole subject well considered and the cases collected in Mr. Clark's treatise on Criminal Law (2d Ed.), 316-323. See some of the statutes in 2 Whart. Crim. Law, § 2068 *et seq.;* Rev. Stat. Ill. (1874), 366, § 96 *et seq.;* Code of Iowa, 1873, 636, § 4073; 2 Comp. Laws Mich., 1871, § 7590.

lowing) is also an offence at common law, was described by statute 5 & 6 Edw. VI. c. 14, to be the buying or contracting for any merchandise or victual coming in the way to market, or dissuading persons from bringing their goods or provisions there, or persuading them to enhance the price when there,— any of which practices make the market dearer to the fair dealer.

7. **Regrating** was described by the same statute to be the buying of corn or other dead victual in any market, and selling it again in the same market, or within four miles of the place; for this also enhances the price of the provisions, as every successive seller must have a successive profit.

8. **Engrossing** was also described to be the getting into one's possession or buying up large quantities of corn or other dead victuals, with intent to sell them again. This must of course be injurious to the public, by putting it in the power of one or two rich men to raise the price of provisions at their own discretion. And so the total engrossing of any other commodity with an intent to sell it at an unreasonable price is an offence indictable and finable at the common law. [159] And the general penalty for these three offences by the common law (for all the statutes concerning them were repealed by 12 Geo. III. c. 71) is, as in other minute misdemeanors, discretionary fine and imprisonment.[5]

9. **Monopolies** are much the same offence in other branches of trade that engrossing is in provisions, being a license or privilege allowed by the king for the sole buying and selling, making, working, or using of anything whatsoever whereby the subject in general is restrained from that liberty of manufacturing or tracing which he had be-

5. These three offences have been abolished by statute 7 & 8 Vict., c. 24. Mr. Clark states that they have not been recognized as common law crimes in this country (Clark's Crim. Law [2d Ed.], 410; though Mr. Wharton states that obtaining a monopoly of a necessary commodity for the purpose of selling for grossly extortionate prices is still indictable at common law. Id.; 2 Whart. Crim. Law, §§ 1849-1851; Morris Run Coal Co. v. Coal Co., 68 Pa. St. 173, 187. See, also, Clark's Crim. Law, 146 and notes.

fore. These had been carried to an enormous height during the reign of Queen Elizabeth, and were heavily complained of by Sir Edward Coke in the beginning of the reign of King James I., but were in great measure remedied by statute 21 Jac. I. c. 3, which declares such monopolies to be contrary to law and void, except as to patents not exceeding the grant of fourteen years to the authors of new inventions, and except also patents concerning printing, saltpetre, gunpowder, great ordnance, and shot; and monopolists are punished with the forfeiture of treble damages and double costs to those whom they attempt to disturb. **Combinations** also among victuallers or artificers to raise the price of provisions or any commodities, or the rate of labor, are in many cases severely punished by particular statutes.[6]

10. **To exercise a trade in any town without having previously served as an apprentice** for seven years is looked upon to be detrimental to public trade, upon the supposed want of sufficient skill in the trader, and therefore is punished by statute 5 Eliz. c. 4, with the forfeiture of forty shillings by the month.

11. Lastly, to prevent the destruction of our home manufactures, the **transporting and seducing our artists to settle abroad** is prohibited by the statutes 5 Geo. I. c. 27, and 23 Geo. II. c. 13.

6. See generally, Clark's Crim. Law (2d Ed.), 146-148 and cases cited.

CHAPTER XIII.

OF OFFENCES AGAINST THE PUBLIC HEALTH AND THE PUBLIC POLICE OR ECONOMY.

1. The first of these offences is a felony [161] [and relates to the isolation of persons infected with the plague, or dwelling in an infected house. The statutes upon the subject of **quarantine** are also referred to in this connection. Not applicable to this country.]

[" **It is a misdemeanor at common law to expose a person laboring under an infectious disorder,** as the small-pox, in the streets or other public places.[1]

2. A second, but much inferior species of offence against public health is the **selling of unwholesome provisions.** [162] To prevent which the statute 51 Hen. III. st. 6, and the ordinance for bakers, c. 7, prohibit the sale of corrupted wine, contagious or unwholesome flesh. [" It is a misdemeanor at common law to give any person injurious food to eat, whether the offender be excited by malice or a desire of gain."][2] These are all the offences which may properly be said to respect the public health.

V. The last species of offences which especially affect the commonwealth are those **against the public police or economy.** By the public police and economy I mean the due regulation and domestic order of the kingdom, whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighborhood, and good manners, and to be decent, industrious, and inoffensive in their respective stations. This head of offences must therefore be very miscellaneous, as it comprises all such crimes as especially affect public society, and are not comprehended under any of the four preceding species. These amount, some of them to felony, and others to misdemeanors only. Among the former are:

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1. 4 M. & S. 73, 272. See *post*, Nuisances, also Clark's Crim. Law (2d Ed.), 347 and cases.

2. 2 East. P. C. 822; 6 East. 133-141.

1. The offence of clandestine marriages. [163] [Not applicable to this country.]

2. Another felonious offence is what some have corruptly called bigamy,[3] which properly signifies being twice married, but is more justly denominated **polygamy**, or having a plurality of wives at once.[4] **Such second marriage, living the former husband or wife, is simply void,** and a mere nullity by the ecclesiastical law of England. [164] With us in England it is enacted by statute 1 Jac. I. c. 11, that if any person, being married, do afterwards marry again, the former husband or wife being alive, it is felony, but within the benefit of clergy. The first wife in this case shall not be admitted as a witness against her husband, because she is the true wife; but the second may, for she is indeed no wife at all; and so *vice versa,* of a second husband. This act makes an exception to five cases in which such second marriage, though in the three first it is void, is yet no felony. 1. Where either party hath been continually *abroad* for seven years, whether the party in England hath notice of the other's being living or not. 2. Where either of the parties hath been absent from the other seven years

3. This is a statutory crime in probably all the states. The statutes generally except from their penalties a person whose husband or wife has been absent for a certain number of years without being known by such person to be living within that time, and those legally divorced *a vinculo* from the first marriage before the solemnization of the second. Clark's Crim. Law (2d Ed.), 353. In some of the states the statutes prohibit a second marriage after divorce. See, generally, Id., 355 and notes.

4. 3 Inst. 88. Bigamy, according to the canonists, consisted in marrying two virgins successively, one after the death of the other, or once marrying a widow. Such were esteemed incapable of orders, etc., and by a canon of the council of Lyons, A. D. 1274, held under pope Gregory X. were *omni privilegio clericali nudati, et coercioni fori secularis addicti.* 6 Decretal, 1, 12. This canon was adopted and explained in England, by statute 4 Edw. I., st. 3, c. 5, and *bigamy* thereupon became no uncommon counter-plea to the claim of the benefit of clergy. M. 40 Edw. III., 42; M. 11 Hen. IV., 11, 48; M. 13 Hen. IV., 6 Staundf. P. C. 134. The cognizance of the plea of *bigamy* was declared by statute 18 Edw. III., st. 3, c. 2, to belong to the court christian, like that of *bastardy.* But by stat. 1 Edw. VI., c. 12, § 16, *bigamy* was declared to be no longer an impediment to the claim of clergy. See Dal. 21, Dyer, 201.

within this kingdom, and the remaining party hath had no knowledge of the other's being alive within that time. 3. Where there is a divorce (or separation *a mensa et thoro*) by sentence in the ecclesiastical court. 4. Where the first marriage is declared absolutely void by any such sentence, and the parties loosed *a vinculo*. Or, 5. Where either of the parties was under the age of consent at the time of the first marriage, for in such case the first marriage was voidable by the disagreement of either party, which the second marriage very clearly amounts to. But if at the age of consent the parties had agreed to the marriage, which completes the contract, and is indeed the real marriage, and afterwards one of them should marry again, I should apprehend that such second marriage would be within the reason and penalties of the act. [165]

3. A third species of felony against the good order and economy of the kingdom is by **idle soldiers and mariners wandering about the realm,** or persons pretending so to be, and abusing the name of that honorable profession. [Repealed.]

4. **Outlandish persons calling themselves Egyptians, or gypsies,** are another object of the severity of some of our unrepealed statutes. [The act of 5 Eliz. c. 20, is repealed, and gypsies are now only punishable as vagrants.]

5. To descend next to offences whose punishment is short of death. **Common nuisances** are a species of offence against the public order and economical regimen of the state, being either the doing of a thing to the annoyance of all the king's subjects [i. e. of the community at large], or the neglecting to do a thing which the common good requires. [167] Common nuisances are such inconvenient and troublesome offences as annoy the whole community in general and not merely some particular person, and therefore are indictable only and not actionable [unless special damage is shown].[5] Of this nature are 1. **Annoyances in**

5. See *ante*, note. "Whatever tends to endanger life, or generate disease and affect the health of the community; whatever shocks the public morals and sense of decency; whatever shocks the religious feelings of the community or tends to its discomfort, is generally, at common law

highways, bridges, and public rivers, by rendering the same inconvenient or dangerous to pass, either positively by actual obstructions, or negatively by want of reparations. For both of these the person so obstructing, or such individuals as are bound to repair and cleanse them, or (in default of these last) the parish at large, may be indicted, distrained to repair and mend them, and in some cases fined. Where there is a house erected or an inclosure made upon any part of the king's demesnes, or of an highway, or common street, or public water, or such like public things, it is properly called a *purpresture*. 2. All those kinds of nuisances (such as **offensive trades and manufactures),** which when injurious to a private man are actionable, are, when detrimental to the public, punishable by public prosecution, and subject to fine, according to the quantity of the misdemeanor; and particularly the **keeping of hogs in any city** or market town is indictable as a public nuisance. [168] **All disorderly inns or ale-houses, bawdy-houses, gaming-houses,**[6] *stage-plays* unlicensed, booths and stages for *rope-dancers, mountebanks,* and the like, are public nuisances, and may upon indictment be suppressed and fined. Inns in particular, being intended for the lodging and receipt of travellers, may be indicted, suppressed, and the innkeepers fined, if they refuse to entertain a traveller without a very sufficient cause; for thus to frustrate the end of their institution is held to be disorderly behavior. 4. By statute 10 & 11 W. III. c. 17, all **lotteries** are declared to be public nuisances, and all grants, patents, or licenses for the same to be contrary to law. But as state-lotteries have for many years past been found a ready mode for raising the supply,

a public nuisance and a crime." Clark's Crim. Law (2d Ed.), 346 and cases cited in notes, where a large number of instances are stated. "There may be nuisances in public deportment, such as common brawlers, common scolds, common barrators, open and notorious drunkenness, indecent and public exposure of the person," etc., etc. Id., 348, 349.

6. Private gambling is not a nuisance at common law; but gambling becomes so if conducted openly and notoriously. Id., 349; Lord v. State, 16 N. H. 325; Kneffler v. Com., 94 Ky. 359 (stock gambling). Many of the acts and conditions that were nuisances at common law have also been made such by statute. Consult the local statutes and ordinances of cities.

an act was made, 19 Geo. III. c. 21, to license and regulate the keepers of such lottery-offices. [State lotteries are now abolished.] 5. **The making and selling of fireworks** and *squibs*, or throwing them about in any street, is, on account of the danger that may ensue to any thatched or timber buildings, declared to be a common nuisance by statute 9 & 10 W. III. c. 7, and therefore is punishable by fine. [Indictable also at common law.] And to this head we may refer (though not declared a common nuisance) the making, keeping, or carriage of too large a quantity of **gunpowder** at one time or in one place or vehicle, which is prohibited by statute, 12 Geo. III. c. 61, under heavy penalties and forfeiture. 6. **Eavesdroppers**, or such as listen under walls or windows or the eaves of a house to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet, or are indictable at the sessions, and punishable by fine and finding sureties for their good behavior. 7. Lastly, **a common scold**, *communis rixatrix* (for our law-Latin confines it to the feminine gender), is a public nuisance to her neighborhood. For which offence she may be indicted, and if convicted shall be sentenced to be placed in a certain engine of correction called the trebucket, castigatory or *cucking*-stool, which in the Saxon language is said to signify the scolding-stool, though now it is frequently corrupted into *ducking*-stool, because the residue of the judgment is, that when she is so placed therein she shall be plunged in the water for her punishment.[7] [169]

6. **Idleness** in any person whatsoever is also a high offence against the public economy.[8]

7. Under the head of public economy may also be properly ranked all **sumptuary laws against luxury**, and extravagant expenses in dress, diet, and the like, concerning the general utility of which to a state there is

7. The ducking-stool is not the punishment of a common scold in Pennsylvania. The offence now, however, is indictable, and to be punished by fine, or by fine and imprisonment, at the discretion of the court. James v. Commonwealth, 12 Serg. & R. 220 (1825); United States v. Royall, 3 Cranch, C. C. 620 (1829).

8. See the statutes on *vagrancy* in the several states.

much controversy among the political writers. [170] [All such laws are opposed to the spirit of our institutions.]

8. Next to that of luxury naturally follows the offence of **gaming**, which is generally introduced to supply or retrieve the expenses occasioned by the former. [171][9]

9. [The killing of **game**, here treated by our author, has been made the subject of a great variety of statutes in this country, which see.] [173]

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9. "At common law, the playing at cards, dice, and other games of chance, merely for the purposes of recreation, and without any view to inordinate gain, is regarded as innocent. But a common player at hazard, using false dice, is liable to be indicted at common law, and any persons cheating by means of cards or dice might be fined or imprisoned in proportion to the nature of the offence." See *ante*, note. This subject has been variously legislated upon in the United States; see the local statutes.

CHAPTER XIV.

OF HOMICIDE.

Homicide, or the killing of any human creature, is of three kinds, *justifiable, excusable,* and *felonious.* [177] The first has no share of guilt at all; the second very little; but the third is the highest crime against the law of nature that man is capable of committing. [178]

I. **Justifiable homicide** is of divers kinds.

1. **Such as is owing to some unavoidable necessity,** without any will, intention, or desire, and without any inadvertence or negligence in the party killing, and therefore without any shadow of blame. As, for instance, by virtue of such an office as obliges one, in the **execution of public justice,** to put a malefactor to death who had forfeited his life by the laws and verdict of his country. But the law must *require* it, otherwise it is not justifiable; therefore, wantonly to kill the greatest of malefactors, a felon or a traitor, attainted or outlawed, deliberately, uncompelled, and extrajudicially, is murder.[1] And further, if judgment of death be given by a judge not authorized by lawful commission, and execution is done accordingly, the judge is guilty of murder. Also such judgment, when legal, must be executed by the proper officer or his appointed deputy; for no one else is *required* by law to do it, which requisition it is that justifies the homicide. If another person doth it of his own head it is held to be murder, even though it be the judge himself. [179] It must further be executed *servato juris ordine;*[2] it must pursue the sentence of the court. If an officer beheads one who is adjudged to be hanged, or *vice versa,* it is murder; for he is merely ministerial, and therefore only justified when he acts under the authority and compulsion of the law.

1. Clark's Crim. Law, 153; Com. v. Bowen, 13 Mass. 356; Evans v. People, 49 N. Y. 86. Even an enemy cannot lawfully be killed except in war. State v. Gut, 13 Minn. 341.

2. According to the order of the court.

Again, in some cases homicide is justifiable rather by the *permission* than by the absolute *command* of the law, either for the *advancement* of public *justice*, which without such indemnification would never be carried on with proper vigor, or in such instances where it is committed for the *prevention* of some atrocious *crime* which cannot otherwise be avoided.[3]

2. **Homicides committed for the advancement of public justice** are: 1. Where an officer, in the execution of his office, either in a civil or criminal case, kills a person that assaults and resists him. 2. If an officer or any private person attempts to take a man charged with felony and is resisted, and in the endeavor to take him kills him.[4] 3. In case of a riot or rebellious assembly, the officers endeavoring to disperse the mob are justifiable in killing them, both at common law and by the riot act, 1 Geo. I. c. 5. [180] 4. Where the prisoners in a gaol or going to a gaol assault the gaoler or officer, and he in his defence kills any of them, it is justifiable for the sake of preventing an escape.

5. If trespassers in forests, parks, chases, or warrens will not surrender themselves to the keepers, they may be slain, by virtue of the statute 21 Edw. I. st. 2, *de malefactoribus in parcis*,[5] and 3 & 4 W. & M. c. 10.

But in all these cases there must be an apparent necessity on the officer's side, viz., that the party could not be arrested or apprehended, the riot could not be suppressed, the prisoners could not be kept in hold, &c., unless such homicide were committed; otherwise, without such absolute necessity, it is not justifiable.[6]

6. If the champions in a trial by battle killed either of them the other, such homicide was justifiable.

In the next place, **such homicide as is committed for the**

3. See Clark's Crim. Law, 158, 160, 164, where the subject of justifiable and excusable homicide is well considered and the cases cited.

4. Not so in civil cases and misdemeanors where the person sought to be arrested does not resist but flees. Clark's Crim. Law, 163; State v. Moore, 39 Conn. 244.

5. Concerning criminals in parks.

6. Clark's Crim. Law, 161.

prevention of any forcible and atrocious crime is justifiable by the law of nature, and also by the law of England, as it stood so early as the time of Bracton, and as it is since declared in statute 24 Hen. VIII. c. 5. If any person attempts a robbery or murder of another, or attempts to break open a house *in the night-time* (which extends also to an attempt to burn it), and shall be killed in such attempt, the slayer shall be acquitted and discharged.[7] This reaches not to any crime unaccompanied with force, as picking of pockets, or to the breaking open of any house *in the day-time,* unless it carries with it an attempt of robbery also.[8] The English law justifies a woman killing one who attempts to ravish her, and so too the husband or father may justify killing a man who attempts a rape upon his wife or daughter;[9] but not if he takes them in adultery by consent, for the one is forcible and felonious, but not the other.[1] [181] And I make no doubt but the forcibly attempting a crime of a still more detestable nature may be equally resisted by the death of the unnatural aggressor. For the one uniform principle that runs through our own and all other laws seems to be this: that **where a crime, in itself capital, is endeavored to be committed by force, it is lawful to repel that force by the death of the party attempting.**[2]

In these instances of *justifiable* homicide it may be observed that the slayer is in no kind of fault whatsoever, not even in the minutest degree, and is therefore to be totally acquitted and discharged with commendation rather than blame. [181] But that is not quite the case in *excusable* homicide, the very name whereof imports some fault, some error or omission; so trivial, however, that the law excuses it from the guilt of felony, though in strictness it judges it deserving of some little degree of punishment.

II. **Excusable homicide** is of two parts: either *per infortunium,* by misadventure, or *se defendendo,* upon a principle of self-preservation. We will first see wherein these two species of homicide are distinct, and then wherein they agree.

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7. Clark's Crim. Law, 164 and cases cited.
8. Id., 165 and cases cited.
9. Id.
1. Id.
2. Id.

1. **Homicide per infortunium**, or *misadventure*, is where a man, doing a lawful act without any intention of hurt, unfortunately kills another; as where a man is at work with a hatchet, and the head thereof flies off and kills a stander-by, or where a person qualified to keep a gun is shooting at a mark, and undesignedly kills a man, for the act is lawful and the effect is merely accidental.[3] So where a parent is moderately correcting his child, a master his apprentice or scholar, or an officer punishing a criminal, and happens to occasion his death, it is only misadventure, for the act of correction is lawful; but if he exceeds the bounds of moderation, either in the manner, the instrument, or the quantity of punishment, and death ensues, it is manslaughter at least, and in some cases (according to the circumstances) murder, for the act of immoderate correction is unlawful. [183] A tilt or tournament, the martial diversion of our ancestors, was, however, an unlawful act; and so are boxing and sword-playing, the succeeding amusement of their posterity; and therefore, if a knight in the former case, or a gladiator in the latter, be killed, such killing is felony or manslaughter. But if the king command or permit such diversion, it is said to be only misadventure, for then the act is lawful. Likewise to whip another's horse, whereby he runs over a child and kills him, is held to be accidental in the rider, for he had done nothing unlawful, but manslaughter in the person who whipped him, for the act was a trespass, and at best a piece of idleness of inevitably dangerous consequence. And in general, if death ensues in consequence of an idle, dangerous, and unlawful sport, as shooting or casting stones in a town, or the barbarous diversion of cock-throwing,— in these and similar cases the slayer is guilty of manslaughter, and not misadventure only, for these are unlawful acts.[4]

2. **Homicide in self-defence**, or *se defendendo*, upon a sudden affray, is also excusable rather than justifiable by the English law. This right of natural defence does not imply a right of attacking. [184] A man cannot, therefore, le-

3. Id., 176.

4. See, generally, Clark's Crim. Law, 176, 177, where the subject is well considered.

gally exercise this right of preventive defence but in sudden and violent cases, when certain and immediate suffering would be the consequence of waiting for the assistance of the law. Wherefore, to excuse homicide by the plea of self-defence, it must appear that the slayer had no other possible (or at least probable) means of escaping from his assailant.[5]

It is frequently difficult to distinguish this species of homicide (upon *chance-medley* in self-defence) **from that of manslaughter,** in the proper legal sense of the word. But the true criterion between them seems to be this: when both parties are actually combating at the time when the mortal stroke is given, the slayer is then guilty of manslaughter; but if the slayer has not begun the fight, or, having begun, endeavors to decline any further struggle, and afterwards, being closely pressed by his antagonist, kills him to avoid his own destruction, this is homicide excusable by self-defence. For which reason the law requires that the person who kills another in his own defence should have retreated as far as he conveniently or safely can, to avoid the violence of the assault, before he turns upon his assailant; and that not factitiously or in order to watch his opportunity, but from a real tenderness of shedding his brother's blood. [185] The party assaulted must flee as far as he conveniently can, either by reason of some wall, ditch, or other impediment, or as far as the fierceness of the assault will permit him; for it may be so fierce as not to allow him to yield a step without manifest danger of his life or enormous bodily harm, and then in his defence he may kill his assailant instantly.[6]

And as the *manner* of the defence, so is also the **time** to be considered; for if the person assaulted does not fall upon the aggressor till the affray is over, or when he is running away, this is revenge, and not defence. Neither, under the color of self-defence, will the law permit a man to screen himself from the guilt of deliberate murder; for if two per-

5. Id., 166-170 and notes; Wash. Crim. Law (3d Ed.), 82; 1 Bish. Crim. Law (7th Ed.), § 850.

6. Clark's Crim. Law, 166-170; Wash. Crim. Law, 82-85.

sons, A and B, agree to fight a duel, and A gives the first onset, and B retreats as far as he safely can, and then kills A, this is murder, because of the previous malice and concerted design. But if A upon a sudden quarrel assaults B first, and upon B's returning the assault A really and *bona fide* flees, and, being driven to the wall, turns again upon B and kills him, this may be *se defendendo* according to some of our writers; though others have thought this opinion too favorable, inasmuch as the necessity to which he is at last reduced originally arose from his own fault.[7] [186]

Under this excuse, of self-defence, the principal civil and natural relations are comprehended; therefore master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively, are excused; the act of the relation assisting being construed the same as the act of the party himself.[8]

There is one species of homicide se defendendo, where the party slain is equally innocent as he who occasions his death, and yet this homicide is also excusable from the great universal principle of self-preservation, which prompts every man to save his own life perferably to that of another, where one of them must inevitably perish. As, among others, in that case mentioned by Lord Bacon,[9] where two persons, being shipwrecked, and getting on the same plank, but finding it not able to save them both, one of them thrusts the other from it, whereby he is drowned.

III. **Felonious homicide** is an act of a very different nature from the former, being the killing of a human creature of any age or sex, without justification or excuse. [188] This may be done either by killing one's self or another man.

The law has ranked self-murder among the highest crimes, making it a particular species of felony, — a felony

7. Id.

8. Id., 175, 185. The members of a family may protect and defend each other; so may a man's guests and neighbors aid in resisting an attack on his house. Clark's Crim. Law, 175 and cases cited. See Semayne's Case, 5 Coke, 91; 1 Smith's Lead. Cas. 183 and notes.

9. Elem., c. 5. See, also, Hawk. P. C. 73; United States v. Holmes, 1 Wall. Jr. 1. See, however, *contra*, Queen v. Dudley, 14 Q. B. 273.

committed on one's self. [189] And this admits of accessaries before the fact as well as other felonies; for if one persuades another to kill himself, and he does so, the adviser is guilty of murder. A *felo de se*,[1] therefore, is he that deliberately puts an end to his own existence or commits any unlawful malicious act, the consequence of which is his own death: as if, attempting to kill another, he runs upon his antagonist's sword, or, shooting at another, the gun bursts and kills himself. The party must be of years of discretion and in his senses, else it is no crime. But this excuse ought not to be strained to that length to which our coroner's juries are apt to carry it, viz., that the very act of suicide is an evidence of insanity, as if every man who acts contrary to reason had no reason at all. The law very rationally judges that every melancholy or hypochondriac fit does not deprive a man of the capacity of discerning right from wrong, which is necessary to form a legal excuse. [190] And therefore if a real lunatic kills himself in a lucid interval, he is a *felo de se* as much as another man.[2]

But what **punishment** can human laws inflict on one who has withdrawn himself from their reach? They can only act upon what he has left behind him, his reputation and fortune,—on the former, by an ignominious burial in the highway with a stake driven through his body, on the latter, by a forfeiture of all his goods and chattels to the king.

The other species of criminal homicide is that of killing another man; but in this there are also degrees of guilt, which divide the offence into *manslaughter* and *murder*.

1. **Manslaughter is defined to be the unlawful killing of another without malice either express or implied**, which may be either voluntarily upon a sudden heat, or involuntarily, but in the commission of some unlawful act.[3] [191] And hence it follows that in manslaughter there can be no

1. Murder of one's self.

2. It has been held in this country that suicide is not a crime, though there is a conflict of cases on the subject. Clark's Crim. Law (2d Ed.), 195, where the cases are collected. There are, however, so far as we know, no forfeitures or penalties therefor in this country.

3. Clark's Crim. Law, 197.

accessaries before the fact, because it must be done without premeditation.[5]

As to the first, or voluntary branch, if upon a sudden quarrel two persons fight and one of them kills the other, this is manslaughter; and so it is if they upon such an occasion go out and fight in a field, for this is one continued act of passion. So also if a man be greatly provoked, as by pulling his nose, or other great indignity, and immediately kills the aggressor though this is not excusable *se defendendo,*[6] since there is no absolute necessity for doing it to preserve himself, yet neither is it murder, for there is no previous malice; but it is manslaughter. But in this and in every other case of homicide upon provocation, if there be a sufficient **cooling-time** for passion to subside and reason to interpose, and the person so provoked afterwards kills the other, this is deliberate revenge and not heat of blood, and accordingly amounts to murder.[7] So if a man takes another in the act of adultery with his wife, and kills him directly upon the spot, in England it is not absolutely ranked in the class of justifiable homicide, as in case of a forcible rape, but it is manslaughter. [192] Manslaughter, therefore, on a sudden provocation **differs from excusable homicide** *se defendendo* in this, that in one case there is an apparent necessity for self-preservation to kill the aggressor, in the other no necessity at all, being only a sudden act of revenge.

The second branch, or involuntary manslaughter, differs also from homicide excusable by misadventure in this, that misadventure always happens in consequence of a lawful act, but this species of manslaughter in consequence of an unlawful one. As if two persons play at sword and

5. Id., 211.

6. In self-defence.

Mere words do not, at common law, constitute sufficient provocation. Wash. Crim. Law, 80. See Norman v. State, 26 Tex. App. 221. Nor would it be manslaughter if the death were caused by the use of a deadly weapon or by brutal violence. Id., 81; East's P. C. 233-235, 252.

7. Wash. Crim. Law, 81. The killing by the husband of an adulterer discovered in the act with his wife is manslaughter. Clark's Crim. Law, 202; Shafflin v. People, 62 N. Y. 229; Galvin v. State, 6 Coldw. (Tenn.) 283.

buckler, unless by the king's command, and one of them kills the other, this is manslaughter, because the original act was unlawful; but it is not murder, for the one had no intent to do the other any personal mischief. So where a person does an act lawful in itself, but in an unlawful manner, and without due caution and circumspection, as when a workman flings down a stone or piece of timber into the street and kills a man, this may be either misadventure, manslaughter, or murder, according to the circumstances under which the original act was done. If it were in a country village where few passengers are, and he calls out to all people to have a care, it is misadventure only; but if it were in London, or other populous town where people are continually passing, it is manslaughter, though he gives loud warning, and murder if he knows of their passing and gives no warning at all, for then it is malice against all mankind. And in general, when an involuntary killing happens in consequence of an unlawful act, it will be either murder or manslaughter, according to the nature of the act which occasioned it. If it be in prosecution of a felonious intent, or in its consequences naturally tended to bloodshed, it will be murder; but if no more was intended than a mere civil trespass, it will only amount to manslaughter.[8] [193]

Next, as to the **punishment** of this degree of homicide, the crime of manslaughter amounts to **felony**, but within the benefit of clergy; and the offender shall be burnt in the hand and forfeit all his goods and chattels.

2. **Murder is thus defined** by Sir Edward Coke: "**When a person of sound memory and discretion unlawfully killeth any reasonable creature in being and under the king's peace with malice aforethought, either express or implied.**" [195]

First, **it must be committed by a person of sound memory and discretion**, for lunatics or infants, as was formerly observed, are incapable of committing any crime, unless in such cases where they show a consciousness of doing wrong, and of course a discretion or discernment between good and evil.[9]

8. Clark's Crim. Law, 204 and cases cited.

9. See *ante*, note.

Next, it happens when a person of such sound discretion **unlawfully killeth.** The unlawfulness arises from the killing without warrant or excuse, and there must also be **an actual killing** to constitute murder; for a bare assault with intent to kill is only a great misdemeanor, though formerly it was held to be murder. [196] The killing may be by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. And if a person be indicted for one species of killing, as by *poisoning,* he cannot be convicted by evidence of a totally different species of death, as by *shooting* with a pistol, or *starving.* But where they only differ in circumstances, as if a *wound* be alleged to be given with a sword, and it proves to have arisen from a staff, an axe, or a hatchet, this difference is immaterial.[1] There was also by the ancient common law one species of killing held to be murder, which may be dubious at this day, as there hath not been an instance wherein it has been held to be murder for many ages past, — I mean **by bearing false witness against another** with an express premeditated design to take away his life so as the innocent person be condemned and executed.[2] There is no doubt but this is equally murder *in foro conscientiae*[3] as killing with a sword, though the modern law (to avoid the danger of deterring witnesses from giving evidence upon capital prosecutions, if it must be at the peril of their own lives) has not yet punished it as such. [197] **If a man, however, does such an act of which the probable consequence may be, and eventually is, death,** such killing may be murder, although no stroke be struck by himself, and no killing be primarily intended, as was the case of the unnatural son who exposed his sick father to the air against his will, by reason whereof he died, of the harlot who laid her child under leaves in an orchard where a kite struck it and killed it, and of the parish officers who shifted

1. See Whart. Crim. Law, § 1059; Archibald's Crim. Plead. (10th Ed.), 406, 407.

2. Under the Illinois statute, Crim. Code, § 226, murder may be committed by perjury and subornation of perjury.

3. In the forum of conscience.

a child from parish to parish till it died for want of care and sustenance. So too if a man hath a beast that is used to do mischief, and he knowing it *suffers* it to go abroad and it kills a man, even this is manslaughter in the owner; but if he had purposely *turned it loose,* though barely to frighten people and make what it called sport, it is with us (as in the Jewish law) as much murder as if he had incited a bear or dog to worry them. If a physician or surgeon gives his patient a potion or plaster to cure him, which, contrary to expectation, kills him, this is neither murder nor manslaughter, but misadventure, and he shall not be punished criminally, however liable he might formerly have been to a civil action for neglect or ignorance. But it hath been holden that if it be not a *regular* physician or surgeon who administers the medicine or performs the operation, it is manslaughter at the least. Yet Sir Matthew Hale very justly questions the law of this determination.[4] In order also to make the killing murder, **it is requisite that the party die within a year and a day** after the stroke received or cause of death administered, in the computation of which the whole day upon which the hurt was done shall be reckoned the first.[5]

Further, the person killed must be "**a reasonable creature in being and under the king's peace**" at the time of the killing. Therefore to kill an alien, a Jew, or an outlaw, who are all under the king's peace and protection, is as much murder as to kill the most regular-born Englishman, except he be an alien enemy in time of war. [198] To kill a child in its mother's womb is now no murder but a great misprision; but if the child be born alive,[6] and dieth by

4. See this subject fully considered and the cases cited in Ewell's Med. Juris. (2d Ed.), 296-302. In Com. v. Pierce, 138 Mass. 163, Holmes, J., delivering the unanimous opinion of the court, it was held that to constitute manslaughter when there is no evil intent, it is not necessary that the killing should be the result of an unlawful act; it is sufficient if it is the result of reckless or foolhardy presumption judged by the standard of what would be reckless in a man of ordinary prudence under the circumstance.

5. State v. Mayfield, 66 Mo. 125; People v. Wallace, 9 Cal. 30; Com. v. Parker, 2 Pick. 558.

6. In order to constitute murder the child must have been completely

reason of the potion or bruises it received in the womb, it seems by the better opinion to be murder in such as administered or gave them.

Lastly, **the killing must be committed with malice aforethought**, to make it the crime of murder. This is the grand criterion which now distinguishes murder from other killing. And this *malice prepense, malitia praecogitata*, is not so properly spite or malevolence to the deceased in particular, as any evil design in general, — the dictate of a wicked, depraved, and malignant heart; *un disposition a faire un male chose*.[7] And it may be either *express* or *implied* in law. **Express malice** is when one, with a sedate, deliberate mind and formed design doth kill another; which formed design is evidenced by external circumstances discovering that inward intention, as laying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm. [199] This takes in the case of deliberate duelling,[8] where both parties meet avowedly with an intent to murder; and therefore the law has justly fixed the crime and punishment of murder on them and on their seconds also. Also, if even upon a sudden provocation one beats another in a cruel and unusual manner so that he dies, though he did not intend his death, yet he is guilty of murder by express malice; that is, by an express evil design, the genuine sense of *malitia*. As when a park-keeper tied a boy that was stealing wood to a horse's tail, and dragged him along the park; when a master corrected his servant with an iron bar; and a schoolmaster stamped on his scholar's belly; so that each of the sufferers died, these were justly held to be murders, because, the correction being excessive, and such as could not proceed but from a bad

born. It is not necessary, however, that the umbilical cord should have been divided. Ewell's Med. Jur. (2d Ed.), 120. See, however, State v. Winthrop, 2 Am. Crim. Cases, 274, s. c. 43 Iowa, 519; Sheppard v. State, 17 Tex. App. 74. The crime of infanticide has been made the subject of legislation probably in all the states, as has also that of criminal abortion, etc. Consult the local statutes.

7. A disposition to do a bad thing.

8. So by statute in Illinois, Iowa, Massachusetts, Michigan, New York, and possibly other states.

heart, it was equivalent to a deliberate act of slaughter. Neither shall he be guilty of a less crime who kills another in consequence of such a wilful act as shows him to be an enemy to all mankind in general: as going deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharging a gun among a multitude of people. [200] So if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And if two or more come together to do an unlawful act against the king's peace, of which the probable consequence might be bloodshed: as to beat a man, to commit a riot, or to rob a park, and one of them kills a man, — it is murder in them all, because of the unlawful act, the *malitia praecogitata,*[9] or evil intended beforehand.

Also, in many cases where no malice is expressed the law will imply it: as where a man wilfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And if a man kills another suddenly, without any, or without a considerable provocation, the law implies malice; for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause. No affront, by words or gestures only, is a sufficient provocation so as to excuse or extenuate such acts of violence as manifestly endanger the life of another. But if the person so provoked had unfortunately killed the other by beating him in such a manner as showed only an intent to chastise and not to kill him, the law so far considers the provocation of contumelious behavior as to adjudge it only manslaughter, and not murder. In like manner, if one kills an officer of justice either civil or criminal, in the execution of his duty, or any of his assistants endeavoring to conserve the peace, or any private person endeavoring to suppress an affray or apprehend a felon, knowing his authority or the intention with which he interposes, the law will imply malice, and the killer shall

9. Malice aforethought.

be guilty of murder. And if one intends to do another felony, and undesignedly kills a man, this is also murder. [201] Thus if one shoots at A and misses *him,* but kills B, this is murder, because of the previous felonious intent, which the law transfers from one to the other. The same is the case where one lays poison for A, and B, against whom the prisoner had no malicious intent, takes it, and it kills him: this is likewise murder. So also if one gives a woman with child a medicine to procure abortion, and it operates so violently as to kill the woman, this is murder in the person who gave it. **We may take it for a general rule that all homicide is malicious, and of course amounts to murder, unless where justified** by the command or permission of the law; **excused** on the account of accident or self-preservation; **or alleviated** into manslaughter by being either the involuntary consequence of some act not strictly lawful, or (if voluntary) occasioned by some sudden and sufficiently violent provocation. And all these circumstances of justification, excuse, or alleviation, it is incumbent upon the prisoner to make out to the satisfaction of the court and jury, the latter of whom are to decide whether the circumstances alleged are proved to have actually existed, the former, how far they extend to take away or mitigate guilt; for all homicide is presumed to be malicious until the contrary appeareth upon evidence.[1]

The punishment of murder, and that of manslaughter,[2] was formerly one and the same, both having the benefit of clergy; so that none but

1. See an excellent discussion of the term "malice" in Clark's Crim. Law (2d Ed.), 187-196, where the cases are collected and considered. It is defined by Mr. Washburn as "the wilful doing of an unlawful act." Wash. Crim. Law (3d Ed.), 24, citing Com. v. Bormer, 9 Met. 410. See, also, 1 Bish. Crim. Law, § 429; Com. v. Godwin, 122 Mass. 19; Spies v. People, 122 Ill. 1, 174. The discussion of our author in the text seems beyond criticism.

2. Regulated entirely by statute.

In some of the states murder is divided into degrees according to its enormity, though there are none at the common law. See Wash. Crim. Law (3d Ed.), 74. In others it remains substantially as at common law, many of the statutes in defining it adopting in substance the common law definition. Consult the local statutes.

unlearned persons, who least knew the guilt of it, were put to death for this enormous crime. But now by several statutes the benefit of clergy is taken away from murderers through *malice prepense*, their abettors, procurers, and counselors.

Petit treason, according to the statute 25 Edw. III. c. 2, may happen three ways: by a servant killing his master, a wife her husband, or an ecclesiastical person (either secular or regular) his superior, to whom he owes faith and obedience. [203] [Abolished by statute.]

CHAPTER XV.

OF OFFENCES AGAINST THE PERSONS OF INDIVIDUALS.

Of these offences some are felonies, and in their nature capital; others are simple misdemeanors, and punishable with a lighter animadversion. [205] Of the felonies, the first is that of *mayhem.*

I. **Mayhem,** *mayhemium,* is properly defined to be the violently depriving another of the use of such of his members as may render him the less able in fighting, either to defend himself, or to annoy his adversary. And therefore the cutting off or disabling or weakening a man's hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear or nose, or the like, are not held to be mayhems at common law, because they do not weaken, but only disfigure him.[1] [206]

By the statute of 22 & 23 Car. II. c. 1, called **the Coventry act,** being occasioned by an assault on Sir John Coventry in the street, and slitting his nose in revenge (as was supposed) for some obnoxious words utted by him in parliament, it is enacted that if any person shall of malice aforethought and by lying in wait unlawfully cut out or disable the tongue, put out an eye, slit the nose, cut off a nose or lip, or cut off or disable any limb or member of any other person, *with intent to maim or disfigure him,* such person, his counselors, aiders, and abettors, shall be guilty of felony without benefit of clergy. [207]

II. The second offence, more immediately affecting the personal security of individuals, relates to the female part of his majesty's subjects, being that of their **forcible abduction and marriage,** which is vulgarly called *stealing an heiress.* [208] [A statutory felony, 3 Hen. VII. c. 2.]

III. A third offence against the female part also of his majesty's subjects, but attended with greater aggravation

1. Clark's Crim. Law, 213; 1 East. P. C. 393. By statute it has in most of the states been extended to include injuries merely disfiguring. Clark's Crim. Law, 213.

than that of forcible marriage, is **the crime of rape,** *raptus mulierum,* **or the carnal knowledge of a woman forcibly and against her will.**[1] [210]

At present there is **no limitation** fixed [as to the time when complaint must be made], for as it is usually now punished by indictment at the suit of the king, the maxim of law takes place that *nullum tempus occurrit regi;*[2] but the jury will rarely give credit to a stale complaint. [211]

By statute 18 Eliz. c. 7, forcible rape is made **felony** without benefit of clergy, as is also the abominable wickedness of carnally knowing and abusing any woman child under the age of ten years, in which case the consent or non-consent is immaterial, as by reason of her tender years she is incapable of judgment and discretion.[3] [212]

A male infant under the age of fourteen years is presumed by law incapable to commit a rape, and therefore it seems cannot be found guilty of it.[4]

But the law of England holds it to be felony to force even a concubine or **harlot,** because the woman may have forsaken that unlawful course of life.[5] [213]

With regard to the competency and credibility of witnesses, —

First, **the party ravished may give evidence upon oath,** and is in law a competent witness; but the credibility of her testimony, and how far forth she is to be believed, must be left to the jury upon the circumstances of fact that concur in that testimony. For instance, if the witness be of good

1. 2 Bish. Crim. Law (7th Ed.), § 1113; Wash. Crim. Law (3d Ed.), 93.

2. No time bars the king.

3. Made the subject of statutes probably in most of the states.

4. Some American cases hold that a boy under fourteen years of age is only *prima facie* incapable. See the cases collected in 2 Bish. Crim. Law (7th Ed.), § 1117 and notes; McClain Crim. Law, § 449; Ewell's Med. Jur. (2d Ed.), 142.

This crime cannot be committed by a husband in person upon his wife. McClain's Crim. Law, § 449; though he may be guilty of rape upon her by aiding another in the commission of the act. People v. Chapman, 62 Mich. 280; State v. Dowell, 106 N. C. 722. See, generally, on this subject, Clark's Crim. Law (2d Ed.), 215-224.

5. Clark's Crim. Law, 222; Carney v. State, 118 Ind. 525; People v. Crego, 70 Mich. 319.

fame; if she presently discovered the offence and made search for the offender; if the party accused fled for it, — these and the like are concurring circumstances which give greater probability to her evidence. But, on the other side, if she be of evil fame[6] and stand unsupported by others; if she concealed the injury for any considerable time after she had opportunity to complain; if the place where the fact was alleged to be committed was where it was possible she might have been heard, and she made no outcry, — these and the like circumstances carry a strong but not conclusive presumption that her testimony is false or feigned. [214]

Moreover, if the rape be charged to be committed on an infant under twelve years of age, she may still be a competent witness, if she hath sense and understanding to know the nature and obligations of an oath, or even to be sensible of the wickedness of telling a deliberate lie. But it is now settled [Brazier's case before the twelve judges, P. 19 G. III.] that no hearsay evidence can be given of the declaration of a child who hath not capacity to be sworn, nor can such child be examined in court without oath, and that there is no determinate age at which the oath of a child ought either to be admitted or rejected.

IV. What has been here observed, especially with regard to the manner of proof, which ought to be more clear in proportion as the crime is the more detestable, may be applied to another offence of a still deeper malignity, **the infamous crime against nature**, committed either with man or beast.[7] [215], — a crime which ought to be strictly and impartially proved, and then as strictly and impartially punished. But it is an offence of so dark a nature, so easily charged, and the negative so difficult to be proved, that the accusation should be clearly made out; for, if false, it deserves a punishment inferior only to that of the crime itself.

These are all the felonious offences more immediately against the personal security of the subject. [216] **The**

6. Clark's Crim. Law, 222 and cases cited.

7. See Sodomy, Bestiality and Buggery defined and the cases collected and considered in Clark's Crim. Law (2d Ed.), 365-7. See, also, Ewell's Med. Jur. (2d Ed.), 159-161.

inferior offences or misdemeanors that fall under this head are **assaults, batteries, wounding, false imprisonment, and kidnapping.**

V. VI. VII. With regard to the nature of the three first of these offences in general, I have nothing further to add to what has already been observed in the preceding book of these Commentaries, when we considered them as private wrongs or civil injuries.[8] But, taken in a public light as a breach of the king's peace, they are also indictable and punishable with fines and imprisonment; or with other ignominious corporal penalties where they are committed with any very atrocious design [217], as in case of an assault with an intent to murder,[9] or with an intent to commit either of the crimes last spoken of.

VIII. The two remaining crimes and offences against the persons of his majesty's subjects, are infringements of their natural liberty, concerning the first of which, **false imprisonment,** its nature and incidents, I must content myself with referring the student to what was observed in the preceding book, when we considered it as a mere civil injury.[1] [218] [Some aggravated species of false imprisonment, such as sending a subject a prisoner into parts beyond the seas, are made the object of special statutes.] Inferior degrees of the offence of false imprisonment are punishable by indictment (like assaults and batteries), and the delinquent may be fined and imprisoned. And indeed there can be no doubt but that all kinds of crimes of a public nature, all disturbances of the peace, all oppressions, and other misdemeanors whatsoever of a notoriously evil example, may be indicted at the suit of the king.

IX. The other remaining offence, that of **kidnapping,** being the forcible abduction or stealing away of a man, woman, or child from their own country, and sending them into another,[2] by the common law of England was punished with fine, imprisonment, and pillory [219] [It is also the subject of punishment by statute.]

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8. See *ante.*

9. This has in this country often been made a substantive offence. See the statutes.

1. See *ante.*

2. Clark's Crim. Law, 248. In many of the states it is made a statutory crime. Id., 249.

CHAPTER XVI.

OF OFFENCES AGAINST THE HABITATIONS OF INDIVIDUALS.

The only two offences that more immediately affect the *habitations* of individuals or private subjects are those of *arson* and *burglary*. [220]

I. **Arson, ab ardendo,**[1] **is the malicious and wilful burning the house or outhouse of another man.** This is an offence of very great malignity.

We will inquire, first, what is such a house as may be the subject of this offence; next, wherein the offence itself consists, or what amounts to a burning of such house; and lastly, how the offence is punished. [221]

1. **Not only the bare dwelling-house, but all out-houses that are parcel thereof,** though not contiguous thereto nor under the same roof, as barns and stables, may be the subject of arson.[1a] And this by the common law, which also accounted it felony to burn a single barn in the field, if filled with hay or corn, though not parcel of the dwelling-house. The burning of a stack of corn was anciently likewise accounted arson. The offence of arson (strictly so called) may be committed by wilfully setting fire to one's own house, provided one's neighbor's house is thereby also burned; but if no mischief is done but to one's own, it does not amount to felony,[2] though the fire was kindled with intent to burn another's. **For by the common law no intention to commit a felony amounts to the same crime,** though it does in some cases, by particular statutes. However, such wilful firing one's own house, *in a town,* is a high misdemeanor, and punishable by fine, imprisonment, pillory, and perpetual sureties for the good behavior. And if a landlord or reversioner sets fire to his own house, of which

1. From burning.

1a. That is they must be within the curtilage. See, generally, Clark's Crim. Law, 256, 257.

2. Clark's Crim. Law, 257. Burning one's own house with intent to defraud the insurer thereof is made a felony by statute in some states. See Wash. Crim. Law (3d Ed.), 27 and note.

another is in possession under a lease from himself, or from those whose estate he hath, it shall be accounted arson; for during the lease the house is the property of the tenant.

2. **As to what shall be said to be a burning**, so as to amount to arson, a bare intent or attempt to do it by actually setting fire to a house, unless it absolutely *burns*, does not fall within the description of *incendit et combussit*,[3] which were words necessary, in the days of law-Latin, to all indictments of this sort. [222] **But the burning and consuming of any part is sufficient**, though the fire be afterwards extinguished.[4] Also it must be a **malicious** burning; otherwise it is only a trespass, and therefore no negligence or mischance amounts to it. For which reason, though an unqualified person, by shooting with a gun, happens to set fire to the thatch of a house, this Sir Matthew Hale determines not to be felony, contrary to the opinion of former writers.

3. The statutes 8 Hen. VI. c. 6, made the wilful burning of houses, under some special circumstances therein mentioned, amount to the crime of high treason; but it was again reduced to felony by the general acts of Edward VI. and Queen Mary; and now the punishment of all capital felonies is uniform, namely, by hanging.

II. **The definition of a burglar**, as given us by Sir Edward Coke, **is "he that by night breaketh and entereth into a mansion-house [of another], with intent to commit a felony."**[5] [224] In this definition there are four things to be considered: the *time*, the *place*, the *manner*, and the *intent*.

1. **The time must be by night**, and not by day, for in the daytime there is no burglary. We have seen, in the case of justifiable homicide, how much more heinous all laws made an attack by night rather than by day, allowing the party attacked by night to kill the assailant with impunity. As to what is reckoned night and what day for this purpose,

3. He has burned and consumed.

4. Mere charring will suffice; but not a mere scorching and blackening by the smoke. Clark's Crim. Law, 255; Woolsey v. State, 30 Tex. App. 346; Com. v. Tucker, 110 Mass. 403; Macy v. State, 24 Ark. 44; State v. Spiegel, 111 Iowa, 701.

5. 3 Inst. ch. 3.

the better opinion seems to be that if there be daylight or *crepusculum* enough, begun or left, to discern a man's face withal, it is no burglary. But this does not extend to moonlight; for then many midnight burglaries would go unpunished.[6]

2. **As to the place.** It must be, according to Sir Edward Coke's definition, **in a mansion-house**: and therefore to account for the reason why breaking open a church is burglary, as it undoubtedly is, he quaintly observes that it is *domus mansionalis Dei.*[7] But it does not seem absolutely necessary that it should in all cases be a mansion-house; for it may also be committed by breaking the gates or walls of a *town* in the night. And we may safely conclude that the requisite of its being *domus mansionalis*[8] is only in the burglary of a private house, which is the most frequent, and in which it is indispensably necessary to form its guilt that it must be in a mansion or dwelling-house. [225] For no distant barn, warehouse, or the like is under the same privileges, nor looked upon as a man's castle of defence. Nor is a breaking open of houses wherein no man resides, and which, therefore, for the time being are not mansion-houses, attended with the same circumstances of midnight terror. A house, however, wherein a man sometimes resides, and which the owner hath only left for a short season, *animo revertendi,* is the object of burglary, though no one be in it at the time of the fact committed. And if the barn, stable, or warehouse be parcel of the mansion-house and within the same common fence, though not under the same roof or contiguous, a burglary may be committed therein, for the capital house protects and privileges all its branches and

6. Clark's Crim. Law, 267; Wash. Crim. Law., 34. In some states "night-time" is defined by statutes and in others the word is omitted from the definition. Clark's Crim. Law, 267; Gen. Stat. Mass., ch. 172, § 13; Session Laws Ill. 1877, p. 85.

7. The dwelling-house of God.

8. Mansion-house. "Dwelling-house" includes an outhouse within the curtilege. Clark's Crim. Law, 266. "Dwelling-house" has the same signification as in arson. Id., 267, *ante.* The meaning of the term "house" within which burglary may be committed has been changed by statute in many states to include warehouses, shops, railroad cars, etc. See Clark's Crim. Law, 269.

appurtenances, if within the curtilage or homestall. A chamber in a college or an inn of court, where each inhabitant hath a distinct property, is, to all other purposes as well as this, the mansion-house of the owner. So also is a room or lodging in any private house, the mansion for the time being of the lodger, if the owner doth not himself dwell in the house, or if he and the lodger enter by different outward doors. But if the owner himself lies in the house, and hath but one outward door, at which he and his lodgers enter, such lodgers seem only to be inmates, and all their apartments to be parcel of the one dwelling-house of the owner. Thus, too, the house of a corporation, inhabited in separate apartments by the officers of the body corporate, is the mansion-house of the corporation, and not of the respective officers. But if I hire a shop, parcel or another man's house, and work or trade in it, but never lie there, it is no dwelling-house, nor can burglary be committed therein; for by the lease it is severed from the rest of the house, and therefore is not the dwelling-house of him who occupies the other part, neither can I be said to dwell therein when I never lie there. [226] Neither can burglary be committed in a tent or booth erected in a market or fair, though the owner may lodge therein; for the law regards thus highly nothing but permanent edifices, a house or church, the wall or gate of a town.

3. **As to the manner of committing burglary, there must be both a breaking and an entry** to complete it. But they need not be both done at once; for if a hole be broken one night, and the same breakers enter the next night through the same, they are burglars. **There must in general be an actual breaking**, not a mere legal *clausum fregit*[9] by leaping over invisible ideal boundaries, which may constitute a civil trespass), but a substantial and forcible irruption. As at least by breaking or taking out the glass of, or otherwise opening a window; picking a lock or opening it with a key; nay, by lifting up the latch of a door or unloosing any other fastening which the owner has provided.[1]

9. He broke the close.

1. Clark's Crim. Law, 262.

But if a person leaves his doors or windows open, it is his own folly and negligence, and if a man enters therein it is no burgulary,[2] yet if he afterwards unlocks an inner or chamber door, it is so. But to come down a chimney is held a burglarious entry, for that is as much closed as the nature of things will permit. So also to knock at the door, and upon opening it to rush in, with a felonious intent; or under pretence of taking lodgings to fall upon the landlord and rob him; or to procure a constable to gain admittance in order to search for traitors, and then to bind the constable and rob the house, — all these entries have been adjudged burglarious, though there was no actual breaking; for the law will not suffer itself to be trifled with by such evasions, especially under the cloak of legal process.[3] [227] And so if a servant opens and enters his master's chamber-door with a felonious design, or if any other person lodging in the same house or in a public inn opens and enters another's door with such evil intent, it is burglary. Nay, if the servant conspires with a robber, and lets him into the house by night, this is burglary in both; for the servant is doing an unlawful act, and the opportunity afforded him of doing it with greater ease rather aggravates than extenuates the guilt. **As for the entry, any the least degree** of it, with any part of the body, or with an instrument held in the hands, is sufficient; as to step over the threshold, to put a hand or a hook in at a window to draw out goods, or a pistol to demand one's money, are all of them burglarious entries.[4] The entry may be before the breaking as well as after; for by statute 12 Anne, c. 7, if a person enters into the dwelling-house of another without breaking in, either by day or by night, with intent to commit felony, or being in such a house shall commit any felony, and shall in the night break out of the same, this is declared to be burglary; there having before been different opinions concerning it: Lord Bacon holding the affirmative, and Sir Matthew Hale the negative.

4. **As to the intent,** it is clear that such breaking and entry must be with a **felonious intent,** otherwise it is only a

2. Id.
3. Id., 264.
4. Id., 265.

trespass. And it is the same whether such intention be actually carried into execution or only demonstrated by some attempt or overt act, of which the jury is to judge. And therefore such a breach and entry of a house as has been before described, by night, with intent to commit a robbery, a murder, a rape, or any other felony, is burglary, whether the thing be actually perpetrated or not.[5] [228] Nor does it make any difference whether the offence were felony at common law, or only created so by statute, since that statute which makes an offence felony gives it incidentally all the properties of a felony at common law. Burglary is a felony at common law, but within the benefit of clergy.

5. Clark's Crim. Law, 268.

CHAPTER XVII.

OF OFFICERS AGAINST PRIVATE PROPERTY.

I. **Larceny, or theft,** by contraction for latrociny, *latrocinium,* is distinguished by the law into two sorts: the one called *simple* larceny, or plain theft, unaccompanied with any other atrocious circumstance, and *mixed* or *compound* larceny, which also includes in it the aggravation of a taking from one's house or person. [229]

And first of **simple larceny,** which, when it is the stealing of goods above the value of twelvepence, is called *grand* larceny;[1] when of goods to that value or under, is *petit* larceny, — offences which are considerably distinguished in their punishment, but not otherwise.

Simple larceny is "the felonious taking[2] and carrying away of the personal goods of another."

1. **It must be a taking.** [230] **This implies the consent of the owner to be wanting.** Therefore no delivery of the goods from the owner to the offender upon trust can ground a larceny. As if A lends B a horse and he rides away with him, or if I send goods by a carrier and he carries them away, these are no larcenies. But if the carrier opens a bale or pack of goods, or pierces a vessel of wine and takes away part thereof, or if he carries it to the place appointed and afterwards takes away the whole, these are larcenies; for here the *animus furandi*[3] is manifest, since in the first case he had otherwise no inducement to open the goods, and in the second the trust was determined, the delivery having taken its effect. But bare non-delivery shall not of course be intended to arise from a felonious design, since that may happen from a variety of other accidents. Neither by the common law was it larceny in any servant to run away with the goods committed to

1. This distinction between grand and petit larceny has been abolished by statute in some of the states and retained in others.

2. See several definitions collected in Clark's Crim. Law (2d Ed.), 271, note; Wash. Crim. Law (3d Ed.), 56.

3. Intent to steal.

him to keep, but only a breach of civil trust. But if he had not the possession, but only the care and oversight of the goods, as the butler of the plate, the shepherd of the sheep, and the like, the embezzling of them is felony at common law. [231] So if a guest robs his inn or tavern of a piece of plate, it is larceny; for he hath not the possession delivered to him, but merely the use. Under some circumstances a man may be guilty of felony in taking his own goods: as if he steals them from a pawnbroker, or any one to whom he hath delivered and entrusted them, with intent to charge such bailee with the value; or if he robs his own messenger on the road, with an intent to charge the hundred with the loss according to the statute of Winchester.

2. There must not only be a taking, but a **carrying away.**[4] A bare removal from the place in which he found the goods, though the thief does not quite make off with them, is a sufficient asportation, or carrying away. As if a man be leading another's horse out of a close, and be apprehended in the fact; or if a guest, stealing goods out of an inn, has removed them from his chamber downstairs,— these have been adjudged sufficient carryings away to constitute a larceny. Or if a thief, intending to steal plate, takes it out of a chest in which it was and lays it down upon the floor, but is surprised before he can make his escape with it, this is larceny.

3. This taking and carrying away must also be **felonious,** that is, done *animo furandi,*[5] or, as the civil law expresses it, *lucri causa.*[6] [232] This requisite, besides excusing those

4. Every larceny at common law includes a trespass and an asportation. Clark's Crim. Law, 279.

A bailee lawfully in possession of a thing who wrongfully appropriates it to his own use does not commit larceny, although he may be guilty of embezzlement under the statutes. Id., 281. A carrier of goods who unlawfully appropriates a box or package and contents entrusted to him is not guilty of common law larceny; but if he breaks open the box or package and wrongfully removes a part he is guilty of larceny at common law. Clark's Crim. Law, 282; Com. v. Brown, 4 Mass. 580; Nichols v. People, 17 N. Y. 114.

5. With intent to steal.

6. For the sake of gain.

The felonious quality consists in the *intention* of the prisoner to defraud the owner and to apply the thing stolen to his own use. And it

who labor under incapacities of mind or will, indemnifies also mere trespassers and other petty offenders. As if a servant takes his master's horse without his knowledge and brings him home again; if a neighbor takes another's plough that is left in the field and uses it upon his own land and then returns it; if under color of arrear of rent, where none is due, I distrain another's cattle or seize them,— all these are misdmeanors and trespasses, but no felonies.

4. This felonious taking and carrying away must be **of the personal goods of another,**[7] for if they are things *real*, or savor of the realty, larceny at the common law cannot be committed of them. **Lands, tenements, and hereditaments** (either corporeal or incorporeal) cannot in their nature be taken and carried away. And of **things likewise that adhere to the freehold,** as corn, grass, trees, and the like, or lead upon a house, no larceny could be committed by the rules of the common law; but the severance of them was, and in many things is still, merely a trespass which depended on a subtilty in the legal notions of our ancestors. These things were parcel of the real estate, and, therefore, while they continued so, could not by any possibility be the subject of theft, being absolutely fixed and immovable. And if they were severed by violence so as to be changed into movables, and at the same time by one and the same continued act carried off by the person who severed them, they could never be said to be taken *from* the *proprietor,* in this their newly acquired state of mobility (which is essential to the nature of larceny), being never, as such, in the actual or constructive possession of any one, but of him who committed the trespass. [233] He could not in

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is not necessary that the taking should be done *lucri causa;* taking with an intent to destroy will be sufficient to constitute the offence if done to serve the prisoner or another person, though not in a pecuniary way. Wash. Crim. Law (3d Ed.), 57. Upon the question whether the taking must be *lucri causa,* however, the authorities are not agreed, though the above statement seems to be the better opinion. See the cases collected in Clark's Crim. Law (2d Ed.), 300.

7. Animals *ferae naturae,* fish in a river, bills, notes and other *choses in action;* ore before it has been mined; ice before it has been cut, etc., are not the subject of larceny at common law. Clark's Crim. Law, 272.

strictness be said to have taken what at that time were the personal goods of another, since the very act of taking was what turned them into personal goods. But if the thief severs them at *one* time, whereby the trespass is completed, and they are converted into personal chattels, in the constructive possession of him on whose soil they are left or laid, and come again at *another* time, when they are so turned into personalty, and takes them away, it is larceny, and so it is if the owner or any one else has severed them.[8] Stealing ore out of mines is also no larceny, upon the same principle of adherence to the freehold. [234] Upon nearly the same principle the stealing of writings relating to a real estate is no felony, but a trespass, because they concern the land, or *savor* of the *realty,* and are considered as part of it by the law, so that they descend to the heir together with the land which they concern.[9]

Bonds, bills, and notes, which concern mere *choses in action,* were also at the common law held not to be such goods whereof larceny might be committed, being of no intrinsic value, and not importing any property in *possession* of the person from whom they are taken.[1] Larceny also could not at common law be committed of **treasure-trove or wreck** till seized by the king or him who hath the franchise, for till such seizure no one hath a determinate property therein. [235]

Larceny also cannot be committed of such animals in which there is no property either absolute or qualified, as of **beasts that are ferae naturae** and unreclaimed, such as deer, hares, and conies, in a forest, chase, or warren; fish in an open river or pond; or wild fowls at their natural liberty. But if they are reclaimed or confined, and may serve for food, it is otherwise even at common law; for of deer so inclosed in a park that they may be taken at pleasure, fish in a trunk, and pheasants or partridges in a mew, larceny may be committed. But of all valuable do-

8. The felonious taking and carrying away of various kinds of fixtures, trees, fruit, vegetables, etc., has very generally been made larceny by statute

9. See, generally, Clark's Crim. Law, 272-277.

1. Made larceny by statute in some states.

mestic animals, as horses and other beasts of draught, and of all **animals domitae naturae**,[2] which serve for food, as neat or other cattle, swine, poultry, and the like, and of their fruit or produce taken from them while living, as milk or wool, larceny may be committed; and also of the flesh of such as are either *domitae* or *ferae naturae* when killed. [236] As to those animals which do not serve for food, and which therefore the law holds to have no intrinsic value, as dogs of all sorts,[3] and other creatures kept for whim and pleasure, though a man may have a base property therein and maintain a civil action for the loss of them, yet they are not of such estimation as that the crime of stealing them amounts to larceny.

Notwithstanding, however, that no larceny can be committed unless there be some property in the thing taken, and an owner, yet **if the owner be unknown**, provided there be a property, it is larceny to steal it, and an indictment will lie for the goods of a person unknown. This is the case of stealing a shroud out of a grave, which is the property of those, whoever they were, that buried the deceased; but stealing the corpse itself, which has no owner (though a matter of great indecency), is no felony, unless some of the grave-clothes be stolen with it.[4]

Mixed, or compound larceny is such as has all the properties of simple larceny, but is accompanied with either one or both of the aggravations of a taking from one's *house* or *person*. [239] First, therefore, of larceny from the *house*, and then of larceny from the *person*.

1. **Larceny from the house**, though it seems (from the considerations mentioned in the preceding chapter) to have a higher degree of guilt than simple larceny, yet it is not at all distinguished from the other at common law, unless where it is accompanied with the circumstance of breaking

2. Of a domestic nature.

3. Dogs when taxable; tame song birds; tame doves; reclaimed honey bees; oysters planted in public waters where they did not grow naturally with the spot marked off by stakes, etc., have been held the subject of larceny at common law. Clark's Crim. Law, 273, 274; Washburn's Crim. Law (3d Ed.), 59, 60 and notes.

4. See Williams v. Williams, 21 Am. Law Reg. (N. S.) 508 and note, where the cases are fully collected.

the house by night; and when we have seen that it falls under another description, viz., that of burglary.[5] [240]

5. The statutes of the several states have enlarged the common law crime of larceny and created species of larceny other than those at common law. For example, the statute of Illinois (R. S. 1874, 373, § 139), defines larceny as follows:

"Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another and from a house in the day-time shall be deemed larceny. Larceny may also be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner." The amendment of 1877 to section 70 of the Criminal Code, on burglary, abrogated the old distinction between entry in the day-time and night-time and made certain entries in the day-time burglary; but did not change the phraseology of the definitions above quoted. See 1 Starr & Curtis's Annotated Statutes, Ill., ch. 38, § 305.

Section 312 (Starr & Curtis, id.) provides that "if any bailee of any bank-bill, note, money or other property, shall convert the same to his own use, with intent to steal the same, or secretes the same with intent so to do, he shall be deemed guilty of larceny."

The statute also (Id., § 313) makes it larceny for a bailee to fraudulently convert property bailed to him even though he does not break bulk or otherwise determine the bailment; it also (Id., §§ 314, 316, 317) makes it larceny to steal beasts and birds *ferae naturae*, lead pipe, faucets, etc., from any building, things attached to the realty, newspapers, etc., and makes it a misdemeanor (Id., § 318) to wrongfully tap any connecting wire for taking news dispatches. See, generally, Moore's (Ill.) Crim. Law, Larceny, §§ 483 *et seq.*

The statutes of Illinois also (Id., § 165) provide that "whoever *embezzles* or fraudulently converts to his own use, or secretes with intent to embezzle or fraudulently converts (sic.) to his own use, money, goods or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny." Section 166, id., makes the embezzlement of his empolyer's property by any officer, agent, clerk, or servant of any incorporated company, person or copartnership, or society, larceny. Section 167, id., makes the embezzlement of money, notes, bonds, etc., by any banker, broker, etc., larceny.

There are other section germane to the subject but the above will suffice to show the extensive statutory changes of the common law in Illinois. Doubtless, equally extensive changes will be found in most of the other states. Students expecting to practice should, therefore, after studying the common law upon the subject, consult the statutes of the states in which they respectively expect to practice. See, generally, Clark's Crim. Law (2d Ed.), ch. 11; Washburn's Crim. Law (3d Ed.), 47; Bishop's New Crim. Law and McClain's Crim. Law, titles Larceny and Embezzlement.

2. **Larceny from the person** is either by *privately* stealing, or by open and violent assault, which is usually called *robbery*.[6] [241]

Open and violent larceny from the person, or robbery, is the felonious and forcible taking from the person of another of goods or money to any value, by violence or putting him in fear.[7] [242] **There must be a taking**, otherwise it is no robbery. A mere attempt to rob was indeed held to be felony so late as Henry IV.'s time, but afterwards it was taken to be only a misdemeanor, and punishable with fine and imprisonment, till the statute 7 Geo. II. c. 21, which makes it a felony. If the thief, having once taken a purse, returns it, still it is a robbery; and so it is whether the taking be strictly from the person of another, or in his presence only: as where a robber by menaces and violence puts a man in fear, and drives away his sheep or his cattle before his face. But if the taking be not either directly from his person or in his presence, it is no robbery. 2. **It is immaterial of what value the thing taken is**: a penny as well as a pound, thus forcibly extorted, makes a robbery. 3. Lastly, **the taking must be by force or a previous putting in fear**, which makes the violation of the person more atrocious than privately stealing. This previous violence, or putting in fear, is the criterion that distinguishes robbery from other larcenies. For if one [243] privately steals sixpence from the person of another, and afterwards keeps it by putting him in fear, this is no robbery, for the fear is subsequent: neither is it capital, or privately stealing, being under the value of twelvepence. Not that it is indeed necessary, though usual, to lay in the indictment that the robbery was committed by *putting in fear;* it is sufficient, if laid to be done by *violence*. And when it is laid to be done by putting in fear, this does not imply any great degree of terror or affright in the party robbed: it is enough that so much force, or threatening by word or gesture, be used, as might create an apprehension of danger, or induce a man to part with

6. As to the offence of *privately* stealing from a man's *person*, as by picking his pocket or the like, privily without his knowledge, consult the local statutes.

7. Clark's Crim. Law, 323.

his property without or against his consent. Thus, if a man be knocked down without previous warning, and stripped of his property while senseless, though strictly he cannot be said to be *put in fear,* yet this is undoubtedly a robbery. Or, if a person with a sword drawn begs an alms, and I give it him through mistrust and apprehension of violence, this is a felonious robbery. So if, under a pretence of sale, a man forcibly extorts money from another, neither shall this subterfuge avail him. But it is doubted, whether forcing a higler, or other chapman, to sell his wares, and giving him the full value of them, amounts to so heinous a crime as robbery.[8]

II. **Malicious mischief,** or damage, is the next species of injury to private property which the law considers as a public crime. This is such as is done, not *animo furandi,*[9] or with an intent of gaining by another's loss, which is some, though a weak, excuse, but either out of a spirit of wanton cruelty or black and diabolical revenge, in which it bears a near relation to the crime of arson; for as that affects the habitation, so this does the other property of individuals. And therefore any damage arising from this mischievous disposition, though **only a trespass at common law,** is now by a multitude of statutes made penal in the highest degree.[1]

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8. This crime includes all the elements of larceny (which see) and more, viz., the taking from the person or in his presence, and against his will by violence or putting in fear. See Clark's Crim. Law, 323-326.

To constitute a taking the property must have passed entirely into the possession of the robber; thus snatching an ear-ring from a lady's ear so that the ear is thereby torn is robbery, though the ear-ring is dropped into her hair and found there by the owner. Wash. Crim. Law (3d Ed.), 97; Com. v. Clifford, 8 Cush. 215.

Taking articles from the owner's presence by violence or putting in fear is robbery though the articles are such as cannot be attached to his person, such as cattle, horses, etc. So, if they are taken from a desk which the owner is induced to open by violence or through fear. Wash. Crim. Law (3d Ed.), 98, 99; 2 Whart. Crim. Law (7th Ed.), § 1166 *et seq.*

9. With intent to steal.

1. Malicious mischief is a misdemeanor at common law, but has been made a crime by statutes of manifold character in all the states. There is considerable conflict among the common law authorities. This crime is distinguished from larceny by the lack of the *animus furandi,* or intention to steal. Malice is an essential element of the crime and must be di-

III. **Forgery, or the crimen falsi, may be defined at common law to be "the fraudulent making or alteration of a writing to the prejudice of another man's right,**[2] for which the offender may suffer fine, imprisonment, and pillory. [247] And also, by a variety of statutes, a more severe punishment is inflicted on the offender in many particular cases, which are so multiplied of late as almost to become general. So that, I believe, through the number of these general and special provisions, there is now hardly a case possible to be conceived wherein forgery that tends to defraud, whether in the name of a real or fictitious person, is not made a capital crime. [250]

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rected against the owner of the property injured. Consult the state statutes.

2. Clark's Crim. Law, 333; Wash. Crim. Law (3d Ed.), 53.

This offence was only a misdemeanor at common law, but is now, so far as we know, every where by statute made a felony. The making or alteration must be false and with intent to defraud; the instrument as made or altered, must apparently be legally efficient to impose or charge a liability, that is to say, it must be material. Clark's Crim. Law (2d Ed.), 333; Wash. Crim. Law (3d Ed.), 53. The instrument forged may be a letter of recommendation, an order for delivery of goods, etc., a railroad or theatre ticket, as well as a deed, mortgage, promissory note, bill of exchange or other written contract. Id. and cases cited in notes.

Forgery may be committed by signing one's own name in such a manner as to make the writing purport to be that of another person of the same or a similar name. Clark's Crim. Law, 324; Com. v. Foster, 114 Mass. 311; it may be committed by signing the name of a fictitious person. Clark's Crim. Law, 334; McClain's Crim. Law, § 764; People v. Marion, 29 Mich. 31; State v. Minton, 116 Mo. 605. See *contra*, Com. v. Baldwin, 11 Gray, 197

Alterations or erasures must be material. The addition of words which the law would imply, adding the name of a witness when the paper does not require attestation, etc., do not constitute forgery; but changing the date (when material) amount, place of payment, etc., are material. Altering one's own note after its delivery may be a forgery. See, generally, Clark's Crim. Law (2d Ed.), 333, 340, where the cases are well collected and considered. As this offence has been the subject of much legislation the statutes should always be examined.

Uttering and publishing a false and forged paper knowing it to be such, is punishable at common law provided a fraud is thereby perpetrated. The offence of uttering is distinct from that of forgery; but both offences may be charged in separate counts of the same indictment, though there can be only one judgment where one offence forms part of the other. Wash. Crim. Law (3d Ed.), 56; 3 Greenl. Evid. 103; Parker v. People, 97 Ill. 32.

Uttering false instruments is usually made a substantive offence by statute in the several states.

CHAPTER XVIII.

OF THE MEANS OF PREVENTING OFFENCES.

Preventive justice consists in obliging those persons whom there is a probable ground to suspect of future misbehavior to stipulate with and to give full assurance to the public that such offence as is apprehended shall not happen, by finding pledges or securities for keeping the peace, or for their good behavior. [251] Let us consider, first, what this security is; next, who may take or demand it; and lastly, how it may be discharged.

1. **This security consists in being bound,** with one or more securities, in a recognizance or obligation to the king, entered on record and taken in some court or by some judicial officer, whereby the parties acknowledged themselves to be indebted to the crown in the sum required (for instance 100*l.*), with condition to be void and of none effect if the party shall appear in court on such a day, and in the mean time shall keep the peace; either generally, toward the king and all his liege people, or particularly also with regard to the person who craves the security. [253] Or if it be for the good behavior, then on condition that he shall demean and behave himself well (or be of good behavior), either generally or specially, for the time therein limited, as for one or more years, or for life. This recognizance, if taken by a justice of the peace, must be certified to the next sessions, in pursuance of the statute 3 Hen. VII. c. 1, and if the condition of such recognizance be broken, by any breach of the peace in the one case or any misbehavior in the other, the recognizance becomes forfeited or absolute, and being *estreated* or extracted (taken out from among the other records) and sent up to the Exchequer, the party and his sureties, having now become the king's absolute debtors, are sued for the several sums in which they are respectively bound.

2. **Any justices of the peace,** by virtue of their commission, or those who are *ex-officio* conservators of the peace

may demand such security according to their own discretion; or it may be granted at the request of any subject, upon due cause shown, provided such demandant be under the king's protection. Wives may demand it against their husbands, or husbands, if necessary, against their wives.[1] [254] But feme-coverts and infants under age ought to find security by their friends only, and not to be bound themselves; for they are incapable of engaging themselves to answer any debt, which, as we observed, is the nature of these recognizances or acknowledgments.

3. **A recognizance may be discharged** either by the demise of the king, to whom the recognizance is made; or by the death of the principal party bound thereby, if not before forfeited; or by order of the court to which such recognizance is certified by the justices (as the quarter sessions, assises, or King's Bench), if they see sufficient cause; or in case he at whose request it was granted, if granted upon a private account, will release it, or does not make his appearance to pray that it may be continued.

Thus far what has been said is applicable to both species of recognizances, for the *peace,* and for the *good behavior.* But as these two species of securities are in some respects different, especially as to the cause of granting or the means of forfeiting them, I shall now consider them separately; and first shall show **for what cause such a recognizance, with sureties for the peace, is grantable,** and then, how it may be forfeited.

1. **Any justice of the peace,**[2] may, *ex-officio,* bind all those to keep the peace who in his presence make any affray; or threaten to kill or beat another; or contend together with hot and angry words; or go about with unusual weapons or attendance, to the terror of the people; and all such as he knows to be common barrators; and such as are brought before him by the constable for a breach of peace in his

1. Statutes similar in substance to the text will be found, probably, in all the states of the Union. The Illinois statute will be found in 1 Starr & Curtis's Annotated Statutes, 1372 (Crim. Code), Division 5. See, also, Moore's Crim. Law.

2. Judges of courts of record are, as a rule, also conservators of the peace.

presence; and all such persons as, having been before bound to the peace, have broken it and forfeited their recognizances. [255] Also wherever any private man hath just cause to fear that another will burn his house or do him a corporal injury, by killing, imprisoning, or beating him, or that he will procure others so to do, he may demand surety of the peace against such person; and every justice of the peace is bound to grant it if he who demands it will make oath that he is actually under fear of death or bodily harm, and will show that he has just cause to be so, by reason of the other's menaces, attempts, or having lain in wait for him, and will also further swear that he does not require such surety out of malice or for mere vexation. This is called *swearing the peace* against another; and if the party does not find such sureties as the justice in his discretion shall require, he may immediately be committed till he does.

2. **Such recognizance for keeping the peace when given may be forfeited** by any actual violence, or even an assault or menace to the person of him who demanded it, if it be a special recognizance; or, if the recognizance be general, by any unlawful action whatsoever that either is or tends to a breach of the peace; or more particularly by any one of the many species of offences which were mentioned as crimes against the public peace in the eleventh chapter of this book; or by any private violence committed against any of his Majesty's subjects. But a bare trespass upon the lands or goods of another, which is a ground for a civil action, unless accompanied with a wilful breach of the peace, is no forfeiture of the recognizance. Neither are mere reproachful words, as calling a man knave or liar, any breach of the peace so as to forfeit one's recognizance (being looked upon to be merely the effect of unmeaning heat and passion), unless they amount to a challenge to fight. [256]

The other species of recognizance, with sureties, is for the good abearance or good behavior. This includes security for the peace and somewhat more; we will therefore examine it in the same manner as the other.

1. First, then, **the justices are empowered by the statute 34 Edw. III. c. 1, to bind over to the good behavior** toward the king and his people all them *that be not of good fame,* wherever they be found, to the intent that the people be not troubled nor endamaged, nor the peace diminished, nor merchants and others passing by the highways of the realm be disturbed nor put in the peril which may happen by such offenders. Under the general words of this expression, *that be not of good fame,* it is holden that a man may be bound to his good behavior for causes of scandal *contra bonos mores,* as well as *contra pacem,*— as for haunting bawdy-houses with women of bad fame, or for keeping such women in his own house, or for words tending to scandalize the government, or in abuse of the officers of justice, especially in the execution of their office. Thus also a justice may bind over all night-walkers, eaves-droppers, such as keep suspicious company or are reported to be pilferers or robbers, such as sleep in the day and wake in the night, common drunkards, whoremasters, the putative fathers of bastards, cheats, idle vagabonds, and other persons whose misbehavior may reasonably bring them within the general words of the statutes, as persons not of good fame, — an expression, it must be owned, of so great a latitude as leaves much to be determined by the discretion of the magistrate himself. But if he commits a man for want of sureties, he must express the cause thereof with convenient certainty, and take care that such cause be a good one.

2. **A recognizance for the good behavior may be forfeited** by all the same means as one for the security of the peace may be, and also by some others [257], — as by going armed with unusual attendance to the terror of the people, by speaking words tending to sedition, or by committing any of those acts of misbehavior which the recognizance was intended to prevent. But not by barely giving fresh cause of suspicion of that which perhaps may never actually happen; for though it is just to compel suspected persons to give security to the public against misbehavior that is apprehended, yet it would be hard upon such suspicion, without the proof of any actual crime, to punish them by a forfeiture of their recognizance.

CHAPTER XIX.

OF COURTS OF CRIMINAL JURISDICTION.

1. **The High Court of Parliament** is the supreme court in the kingdom, not only for the making, but also for the execution of laws, by the trial of great and enormous offenders, whether lords or commoners, in the method of **parliamentary impeachment.** [259] An impeachment before the Lords by the Commons of Great Britain, in parliament, is a prosecution of the already known and established law, being a presentment to the most high and supreme court of criminal jurisdiction by the most solemn grand inquest of the whole kingdom. A commoner cannot, however, be impeached before the Lords for any capital offence,[1] but only for high misdemeanors; a peer may be impeached for any crime.[2] [260] And they usually (in case of an impeachment of a peer for treason) address the crown to appoint **a lord high steward** for the greater dignity and regularity of their proceedings, which high steward was formerly elected by the peers themselves, though he was generally commissioned by the king; but it hath of late years been strenuously maintained that the appointment of an high steward in such cases is not indispensably necessary, but that the House may proceed without one. [260] **The articles of impeachment** are a kind of bills of indictment found by the House of Commons, and afterwards tried by the Lords, who are in cases of misdemeanors considered not only as their own peers, but as the peers of the whole nation.

1. See, however, 14 Lord's Journ., p. 260.

2. For misdemeanors, as libels, riots, etc., peers are to be tried, like commoners, by a jury, for, "at the common law, in these four cases only, a peer shall be tried by his peers, viz., in treason, felony, misprision of treason, and misprision of felony; and the statute law which gives such trial, hath reference unto these, or to other offences made treason or felony; his trial by his peers shall be as before; and to this effect are all these statutes, viz., 32 H. VIII., c. 4, Rastall 404, pl. 10; 33 H. VIII., c. 12, Rastall 415; 35 H. VIII., c. 2, Rastall 416; and in all these express mention is made of trial by peers. But in this case of a praemunire, the same being only in effect but a contempt, no trial shall be here in this of a peer by his peers." Per Fleming, C. J., assented to by the whole court, in Rex v. Lord Vaux, 1 Bulstr. 197.

2. **The Court of the Lord High Steward** of Great Britain is a court instituted for the trial of peers indicted for treason or felony, or for misprision of either. [261] When such an indictment is therefore found by a grand jury of freeholders in the King's Bench, or at the assises before the justices of *oyer* and *terminer,* it is to be removed by a writ of *certiorari* into the Court of the Lord High Steward, which only has power to determine it. [262] During the session of parliament the trial of an indicted peer is not properly in the Court of the Lord High Steward, but before the court last mentioned, of our lord the *king in parliament.* [263]

3. **The Court of King's Bench** is divided into a *crown* side and a *plea* side. [265] And on the crown side, or crown office, it takes cognizance of all criminal causes, from high treason down to the most trivial misdemeanor or breach of the peace. Into this court also indictments from all inferior courts may be removed by writ of *certiorari,* and tried either at bar or at *nisi prius* by a jury of the county out of which the indictment is brought.

4. **The Court of Chivalry** is also a criminal court when held before the lord high constable of England jointly with the earl marshal. And then it has jurisdiction over pleas of life and member, arising in matters of arms and deeds of war, as well out of the realm as within it. [Obsolete.]

5. **The High Court of Admiralty,**[3] held before the Lord High Admiral of England or his deputy, styled the Judge of the Admiralty, is not only a court of civil, but also of criminal jurisdiction. [268] This court hath cognizance of all crimes and offences committed either upon the sea or on the coasts, out of the body or extent of any English county; and by statute 15 Ric. II. c. 3, of death and mayhem happening in great ships being and hovering in the main stream of great rivers, below the bridges of the same rivers, which are then a sort of ports or havens, such as are the ports of London and Gloucester, though they lie at a great distance from the sea. But as this court proceeded without jury in a method much conformed to the civil law, the exer-

3. See, generally, 3 Broom & Hadley's Com., ch. 16 and notes.

This jurisdiction in this country is vested in the United States District Courts. Const. U. S., art. 3, § 2. See, generally, Benedict's Admiralty, 4th Ed. 1910. Also *ante,* and note.

cise of a criminal jurisdiction there was contrary to the genius of the law of England. And by the statute 28 Hen. VIII. c. 15, it was enacted that these offences should be tried by commissioners of *oyer* and *terminer,* under the king's Great Seal, namely, the admiral or his deputy, and three or four more (among whom two common law judges are usually appointed); the indictment being first found by a grand jury of twelve men, and afterwards tried by a petty jury; and that the course of proceedings should be according to the law of the land. [269] This is now the only method of trying marine felonies in the Court of Admiralty, the Judge of the Admiralty still presiding therein, as the Lord Mayor is the president of the session of *oyer* and *terminer* in London.

These five courts may be held in any part of the kingdom, and their jurisdiction extends over crimes that arise throughout the whole of it, from one end to the other. What follow are also of a general nature, and universally diffused over the nation, but yet are of a local jurisdiction and confined to particular districts. Of which species are, —

6, 7. **The courts of oyer and terminer, and the general gaol delivery,**[4] which are held before the king's commissioners, among whom are usually two judges of the courts at Westminster, twice in every year in every county of the kingdom, except the four northern ones, where they are held only once, and London and Middlesex, wherein they are held eight times. These were slightly mentioned in the preceding book. We then observed that at what is usually called the assises the judges sit by virtue of five several authorities, the fourth of which is the commission of

4. In the federal system the United States District Court has original jurisdiction of all criminal cases arising under the United States statutes, for there are no common law crimes against the United States. Wash. Crim. Law (3d Ed.), 10, 265.

In the several states criminal jurisdiction is exercised by circuit, district, common pleas or other corresponding courts of general common law jurisdiction. In some of the states, however (as well as in the United States), no act is a crime unless declared to be such by statute. Key v. Vatler, 1 Ohio, 132; Rev. Stat. Ind. 1852, p. 352; id., 1876 (Davis), p. 606; Marvin v. State, 19 Ind. 181; State v. Torrey, 55 Kan. 347. The common law, however, furnishes aid in defining the terms used. Ledgerwood v. State, 134 Ind. 81.

oyer and *terminer*, to hear and determine all treasons, felonies, and misdemeanors. [270]

8. **The court of general quarter sessions of the peace** is a court that must be held in every county once in every quarter of a year. [271] It is held before two or more justices of the peace, one of which must be of the *quorum*. The jurisdiction of this court, by statute 34 Edw. III. c. 1, extends to the trying and determining all felonies and trespasses whatsoever, though they seldom, if ever, try any greater offence than small felonies within the benefit of clergy, their commission providing that if any case of difficulty arises they shall not proceed to judgment, but in the presence of one of the justices of the Court of King's Bench or Common Pleas, or one of the judges of assise. And therefore murders and other capital felonies are usually remitted for a more solemn trial to the assises.

9. **The sheriff's tourn,** or rotation, is a court of record held twice every year, within a month after Easter and Michaelmas, before the sheriff, in different parts of the county, being indeed only the turn of the sheriff to keep a court-leet in each respective hundred; this, therefore, is the great court-leet of the county, as the county-court is the court-baron, for out of this, for the ease of the sheriff, was it taken. [273]

10. **The court-leet,** or *view of frankpledge*, which is a court of record held once in the year and not oftener, within a particular hundred, lordship, or manor, before the steward of the leet, being the king's court granted by charter to the lords of those hundreds or manors. Its original intent was to view the frankpledges, that is, the freemen within the liberty, who, according to the institution of the Great Alfred were all mutually pledges for the good behavior of each other. Besides this the preservation of the peace and the chastisement of divers minute offences against the public good are the objects both of the court-leet and the sheriff's tourn, which have exactly the same jurisdiction, one being only a larger species of the other, extending over more territory, but not over more causes.

11. **The court of the coroners** is also a court of record, to inquire, when any one dies in prison or comes to a violent or sudden death, by what manner he came to his end [274]; and this he is only entitled to do *super visum corporis*.[5]

12. **The court of the clerk of the market** is incident to every fair and market in the kingdom to punish misdemeanors therein, as a court of *pie poudre* is to determine all disputes relating to private or civil property. [275]

5. Upon the view of the body. See *ante*, Book 1.

CHAPTER XX.

OF SUMMARY CONVICTIONS.[1]

By a summary proceeding I mean principally such as is directed by several acts of parliament (for the common law is a stranger to it, unless in the case of contempts) for the conviction of offenders and the inflicting of certain penalties created by those acts of parliament. [280] **In these there is no intervention of a jury,** but the party accused is acquitted or condemned by the suffrage of such person only as the statute has appointed for his judge.

I. Of this summary nature are all trials of **offences and frauds contrary to the laws of the excise,** and other branches of the *revenue,*[2] which are to be inquired into and determined by the commissioners of the respective departments, or by justices of the peace in the country. [281]

II. Another branch of summary proceedings is that **before justices of the peace, in order to inflict divers petty pecuniary mulcts and corporal penalties** denounced by act of parliament for many disorderly offences; such as common swearing, drunkenness, vagrancy, idleness, and a vast variety of others, for which I must refer the student to the justice-books formerly cited (Lombard and Burn), and which were formerly punished by the verdict of a jury in the court-leet.[3]

The process of these summary convictions is extremely speedy; though the courts of common law have thrown in one check upon them, by making it **necessary to summon the party accused** before he is condemned. [283] After this summons the magistrate in summary proceedings may go on to examine one or more witnesses, as the statute may require, upon oath, and then make his conviction of the

1. Charges of vagrancy and disorderly conduct were never triable by jury. State v. Glenn, 54 Md. 572. And petty offences need not be so tried. *Ex parte* Wooten, 62 Miss. 174; Inwood v. State, 42 Ohio St. 186.

But an offence triable by jury at the time of the adoption of the constitution cannot subsequently be made triable without jury. Miller v. Com., 88 Va. 618. See, generally, Cooley's Const. Lim. (7th Ed.), 453, 454, note.

2. With us this lies within federal cognizance.

3. See *ante,* note.

offender in writing, upon which he usually issues his warrant either to apprehend the offender, in case corporal punishment is to be inflicted on him, or else to levy the penalty incurred by distress and sale of his goods.

III. To this head of summary proceedings may also be properly referred the method, immemorially used by the superior courts of justice, of **punishing contempts by attachment, and the subsequent proceedings thereon.**

The contempts that are thus punished are either **direct,** which openly insult or resist the powers of the courts or the persons of the judges who preside there, or else are **consequential,** which (without such gross insolence or direct opposition) plainly tend to create an universal disregard of their authority. [284] The principal instances of either sort that have been usually punishable by attachment are chiefly of the following kinds: — 1. **Those committed by inferior judges and magistrates,** by acting unjustly, oppressively, or irregularly in administering those portions of justice which are intrusted to their distribution, or by disobeying the king's writs issuing out of the superior courts, by proceeding in a cause after it is put a stop to or removed by writ of prohibition, *certiorari,* error, *supersedeas,* and the like. 2. **Those committed by sheriffs, bailiffs, gaolers,** and other officers of the court, by abusing the process of the law, or deceiving the parties by any acts of oppression, extortion, collusive behavior, or culpable neglect of duty. 3. **Those committed by attorneys and solicitors,** who are also officers of the respective courts, by gross instances of fraud and corruption, injustice to their clients, or other dishonest practice. 4. **Those committed by jurymen** in collateral matters relating to the discharge of their office, such as making default when summoned, refusing to be sworn or to give any verdict, eating or drinking without the leave of the court, and especially at the cost of either party, and other misbehavior or irregularities of a similar kind, but not in mere exercise of their judicial capacities, as by giving a false or erroneous verdict. 5. **Those committed by witnesses,** by making default when summoned, refusing to be sworn or examined, or prevaricating in their evidence when sworn. 6. **Those committed by parties to**

any suit or proceeding before the court, as by disobedience to any rule or order made in the progress of a cause, by non-payment of costs awarded by the court upon a motion, or by non-observance of awards duly made by arbitrators or umpires after having entered into a rule for submitting to such determination. [285] Indeed the attachment for most of this species of contempts, and especially for non-payment of costs and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shape of a criminal process for a contempt of the authority of the court. And therefore it hath been held that such contempts, and the process thereon, being properly the civil remedy of individuals for a private injury, are not released or affected by the general act of pardon. 7. **Those committed by any other persons under the degree of a peer,** and even by peers themselves, when enormous and accompanied with violence, such as forcible *rescous* and the like, or when they import a disobedience to the king's great prerogative writs of prohibition, *habeas corpus,* and the rest. **Some of these contempts may arise in the face of the court,** as by rude and contumelious behavior, by obstinacy, perverseness, or prevarication; by breach of the peace or any wilful disturbance whatever; **others in the absence of the party,** as by disobeying or treating with disrespect the king's writ or the rules or process of the court; by perverting such writ or process to the purposes of private malice, extortion, or injustice; by speaking or writing contemptuously of the court or judges acting in their judicial capacity; by printing false accounts (or even true ones without proper permission) of causes then depending in judgment; and by anything, in short, that demonstrates a gross want of that regard and respect, which when once courts of justice are deprived of, their authority (so necessary for the good order of the kingdom) is entirely lost among the people.

If the contempt[4] **be committed in the face of the court,** the offender may be instantly apprehended and imprisoned,

4. The subject of contempt has already been considered *ante.* See Wash. Crim. Law (3d Ed.), 246 and notes; Cooley's Const. Lim. (7th Ed.), 453, note.

at the discretion of the judges, without any further proof or examination. [286] **But in matters that arise at a distance**, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon **affidavit** see sufficient ground to suspect that a contempt has been committed, they either make a **rule** on the suspected party to show cause why an attachment should not issue against him, or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule.[5] [287] This process of attachment is merely intended to bring the party into court, and when there he must either stand committed or put in bail in order to answer upon oath to such **interrogatories** as shall be administered to him for the better information of the court with respect to the circumstances of the contempt. These interrogatories are in the nature of a charge or accusation, and must by the course of the court be exhibited within the first four days, and if any of the interrogatories are improper the defendant may refuse to answer it and move the court to have it struck out. If the party can clear himself upon oath, he is discharged, but if perjured, may be prosecuted for the perjury. If he confesses the contempt, the court will proceed to correct him by fine or imprisonment, or both, and sometimes by a corporal or infamous punishment. If the contempt be of such nature that, when the fact is once acknowledged, the court can receive no further information by interrogatories than it is already possessed of (as in the case of a *rescous*), the defendant may be admitted to make such simple acknowledgment, and receive his judgment without answering to any interrogatories; but if he wilfully and obstinately refuses to answer, or answers in an evasive manner, he is then clearly guilty of a high and repeated contempt, to be punished at the discretion of the court.

5. The attachment in such case is merely a process to bring the defendant before the court to show cause why he should not be punished for a contempt. *Ex parte* Petrie, 38 Ill. 498; Petrie v. People, 4 id. 334; *Ex parte* Langden, 25 Vt. 682.

CHAPTER XXI.

OF ARRESTS.

An arrest is the apprehending or restraining of one's person in order to be forthcoming to answer an alleged or suspected crime. [289] To this arrest all persons whatsoever are, without distinction, equally liable in all criminal cases; but no man is to be arrested unless charged with such a crime as will at least justify holding him to bail when taken. And in general **an arrest may be made four ways:** 1. By warrant; 2. By an officer without warrant; 3. By a private person also without a warrant; 4. By an hue and cry.

1. **A warrant may be granted** in extraordinary cases by the Privy Council or Secretaries of State, but **ordinarily by justices of the peace.**[1] [290] This they may do in any cases where they have a jurisdiction over the offence, in order to compel the person accused to appear before them. And this extends undoubtedly to all treasons, felonies, and breaches of the peace, and also to all such offences as they have power to punish by statute. 1. A justice of the peace hath power to issue a warrant to apprehend a person *accused* of felony, though not yet *indicted*. 2. He may also issue a warrant to apprehend a person *suspected* of felony, though the original suspicion be not in himself, but in the party that prays his warrant, because he is a competent judge of the probability offered to him of such suspicion. But in both cases it is fitting to examine upon oath the party requiring a warrant, as well to ascertain that there *is* a felony or other crime actually committed, without which no warrant should be granted, as also to *prove* the cause and probability of suspecting the party against whom the warrant is prayed. This warrant ought to be under the hand and seal of the justice, should set forth the

1. This is still the ordinary way of instituting a criminal prosecution where the party accused has not already been indicted. See Wash. Crim. Law (3d Ed.), 104, and the state statutes.

time and place of making, and the cause for which it is made, and should be directed to the constable or other peace office (or, it may be, to any private person by name), requiring him to bring the party either generally before *any* justice of the peace for the county, or only before the justice who granted it, the warrant in the latter case being called a **special warrant.** [291] **A general warrant** to apprehend all persons suspected, without naming or particularly describing any person in special, is illegal and void for its uncertainty; for it is the duty of the magistrate, and ought not to be left to the officer, to judge of the ground of suspicion.[2] And a warrant to apprehend all persons guilty of a crime therein specified is no legal warrant, for the point upon which its authority rests is a fact to be decided on a subsequent trial, namely, whether the person apprehended thereupon be really guilty or not. It is therefore in fact *no* warrant at all, for it will not justify the officer who acts under it. And when a warrant is received by the officer he is bound to execute it, so far as the jurisdiction of the magistrate and himself extends. A warrant from the Chief or other Justice of the Court of King's Bench extends all over the kingdom, and is *tested* or *dated England,* not *Oxfordshire, Berks,* or other particular county. But the warrant of a justice of the peace in one county, as Yorkshire, must be backed — that is, signed by a justice of the peace in another, as Middlesex — before it can be executed there. [292] Formerly, regularly speaking, there ought to have been a fresh warrant in every fresh county; but the practice of backing warrants had long prevailed without law, and was at last authorized by statutes 23 Geo. II. c. 26, and 24 Geo. II. c. 55.

2. **Arrests by officers without warrant** may be executed, (1) **By a justice of the peace,** who may himself apprehend, or cause to be apprehended, by word only, any person committing a felony or breach of the peace in his presence. (2) **The sheriff,** and (3) **The coroner** may apprehend any felon within the county without warrant. (4) **The constable,** of whose office we formerly spoke, hath great orig-

2. See Cooley's Const. Lim. (7th Ed.), 425 and notes.

inal and inherent authority with regard to arrests. He may without warrant arrest any one for a breach of the peace committed in his view, and carry him before a justice of the peace. And in case of felony *actually* committed, or a dangerous wounding whereby felony is like to ensue, he may upon probable suspicion arrest the felon,[3] and for that purpose is authorized (as upon a justice's warrant) to break open doors, and even to kill the felon if he cannot otherwise be taken; and if he or his assistants be killed in attempting such arrests, it is murder in all concerned.

(5) **Watchmen,** either those appointed by the statute of Winchester, 13 Edw. I. c. 4, to keep watch and ward in all towns from sunsetting to sunrising, or such as are mere assistants to the constable, may *virtute officii* arrest all offenders, and particularly night-walkers,[4] and commit them to custody till the morning.

3. **Any private person** (and *a fortiori* a peace officer) that is present when any felony is committed is bound by the law to arrest the felon, on pain of fine and imprisonment if he escapes through the negligence of the standers-by. [293] And they may justify breaking open the doors upon following such felon; and if *they kill him,* provided he cannot be otherwise taken, it is justifiable, though if *they are killed* in endeavoring to make such arrest it is murder. Upon probable suspicion, also, a private person may arrest the felon or other person so suspected [provided a felony has actually been committed].[5] But he cannot justify breaking

3. Peace officers by common law have much greater authority to make arrests without a warrant than have individuals. "They are held to be justified if they act in making the arrest upon probable and reasonable grounds for believing the party guilty of a felony. Rohan v. Sawin, 5 Cush. 285.

4. But at common law no peace officer is justified in taking up a night-walker unless he has committed some disorderly or suspicious act. Bac. Abr. Trespass, D. 3; 2 Lord Raym. 1301.

5. "If a felony has in fact been committed by the person arrested, the arrest may be justified by any person without a warrant whether there is time to obtain one or not; but if no felony was committed by any one and a private individual arrest without warrant such arrest is illegal, though an officer would be justified if he

open doors to do it; and if either party kill the other in the attempt, it is manslaughter, and no more. It is no more, because there is no malicious design to kill; but it amounts to so much, because it would be of most pernicious consequence if, under pretence of suspecting felony, any private person might break open a house or kill another, and also because such arrest upon suspicion is barely *permitted* by the law, and not *enjoined,* as in the case of those who are present when a felony is committed.

4. There is yet another species of arrest, wherein both officers and private men are concerned, and that is upon an **hue and cry** raised upon a felony committed. [See Crim. Code of Ill. § 339.] An hue (from *huer,* to shout and cry) *hutesium et clamor,* is the old common-law process of pursuing with horn and with voice all felons and such as have dangerously wounded another. It is also mentioned by statute Westm. 1, 3 Edw. I. c. 9, and 4 Edw. I. *de officio coronatoris.* But the principal statute relative to this matter is that of Winchester, 13 Edw. I. c. 1 and 4, which directs that from thenceforth every county shall be so well kept that immediately upon robberies and felonies committed fresh suit shall be made from town to town and from county to county, and that hue and cry shall be raised upon the felons, and they that keep the town shall follow with hue and cry with all the town and the towns near; and so hue and cry shall be made from town to town until they be taken and delivered to the sheriff. And that such hue and cry may more effectually be made, the hundred is bound by the same statute, cap. 3, to answer for all robberies therein committed unless they take the felon. [294] [These statutes have been repealed.] Hue and cry may be raised either by precept of a justice of the peace, or by a peace officer, or by any private man that knows of a felony. The party raising it must acquaint the constable of the vill with all the circumstances which he knows of the felony and the person of the felon, and thereupon the constable is to search his own town, and raise all the neighboring vills, and make pursuit with horse and foot. And in the prosecution of such hue and cry the constable and his attendants have the same powers, protection, and indemnification as if acting under a warrant of a justice of the peace. But if a man wantonly or maliciously raises an hue and cry without cause, he shall be severly punished as a disturber of the public peace.

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acted upon information from another which he had reason to rely on." Brooks v. Com., 61 Pa. 358, citing Holly v. Mix, 3 Wend. 353.

CHAPTER XXII.

OF COMMITMENT AND BAIL.

When a delinquent is arrested by any of the means mentioned in the preceding chapter, he ought regularly to be carried before a justice of the peace. [296]

The justice before whom such prisoner is brought is bound immediately to **examine the circumstances of the crime alleged**; and to this end, by statute 2 & 3 Ph. & M. c. 10, he is to take in writing the examination of such prisoner [repealed], and the information of those who bring him. If upon this inquiry it manifestly appears that either no such crime was committed or that the suspicion entertained of the prisoner was wholly groundless, in such cases only it is lawful totally to discharge him. Otherwise he must either be committed to prison or give bail, that is, put in securities for his appearance to answer the charge against him.[1] This commitment therefore being only for safe custody, wherever **bail** will answer the same intention it ought to be taken, as in most of the inferior crimes; but in felonies and other offences of a capital nature no bail can be a security equivalent to the actual custody of the person. [297] What the nature of bail is, hath been shown in the preceding book, viz., a delivery of bailment, of a person to his sureties, upon their giving (together with himself) sufficient security for his appearance, he being supposed to continue in their friendly custody instead of going to gaol.[2] In civil cases we have seen that every defendant

1. The general method of procedure in the several states, so far as we have observed, is very like that described in the text, except as to the examination of the accused. In some states the accused may be a witness in his own behalf if he so elects; he may be represented by counsel. The proceedings on such preliminary examination are very much like a trial of the accused except the only object of the examination where the justice cannot try and determine the cause upon its merits, is to determine whether the crime charged has been committed and whether there is probable cause to believe the accused guilty of having committed the same. See, generally, as to the proceedings, Wash. Crim. Law (3d Ed.), 112.

2. Clark's Crim. Proced., 83.

is bailable, but in criminal matters it is otherwise. Let us therefore inquire **in what cases the party accused ought, or ought not, to be admitted to bail.**

And first, to refuse or delay to bail any person bailable, is an offence against the liberty of the subject, in any magistrate by the common law, as well as by the statute Westm. 1, 3 Edw. I. c. 15, and the *habeas corpus* act, 31 Car. II. c. 2. And lest the intention of the law should be frustrated by the justices requiring bail to a greater amount than the nature of the case demands, it is expressly declared by statute 1 W. & M. st. 2, c. 1, that **excessive bail ought not to be required;**[3] though what bail should be called excessive must be left to the courts, on considering the circumstances of the case, to determine. And, on the other hand, if the magistrate takes insufficient bail, he is liable to be fined if the criminal doth not appear. Bail may be taken either in court, or in some particular cases by the sheriff, coroner, or other magistrate, but most usually by the justices of the peace. **Regularly, in all offences either against the common law or act of parliament that are below felony, the offender ought to be admitted to bail,** unless it be prohibited by some special act of parliament.[4] [298]

Let us next see **who may not be admitted to bail,** or what offences are *not* bailable. By the ancient common law, before and since the Conquest, all felonies were bailable, till murder was excepted by statute; so that persons might be admitted to bail before conviction almost in every case. But the statute Westm. 1, 3 Edw. I. c. 15, takes away the power of bailing in treason and in divers instances of felony. The statutes 23 Hen. VI. c. 9, and 1 & 2 Ph. & M. c. 13, give further regulations in this matter; and **upon the whole we may collect that no justice of the peace can bail,**— 1. Upon an accusation of treason; nor, 2. Of murder; nor, 3. In case of manslaughter, if the prisoner be clearly the slayer, and not barely suspected to be so, or if any indict-

3. Clark's Crim. Proced., 88; Cooley's Const. Lim. (7th Ed.), 439; U. S. Const. Amend. 8, and the several state constitutions.

4. Id.; Cooley's Const. Lim. (7th Ed.), 437.

ment be found against him; or, 4. Such as, being committed for felony, have broken prison, because it not only carries a presumption of guilt, but is also superadding one felony to another; 5. Persons outlawed; 6. Such as have abjured the realm; 7. Approvers, of whom we shall speak in a subsequent chapter, and persons by them accused; 8. Persons taken with the mainor, or in the fact of felony; 9. Persons charged with arson; 10. Excommunicated persons, taken by writ *de excommunicato capiendo,* all which are clearly not admissible to bail by the justice. [299] **Others are of a dubious nature,** — as, 11. Thieves openly defamed and known; 12. Persons charged with other felonies or manifest and enormous offences, not being of good fame; and 13. Accessaries to felony, that labor under the same want of reputation. These seem to be in the discretion of the justices, whether bailable or not. The last class **are such as must be bailed** upon offering sufficient surety, — as, 14. Persons of good fame, charged with a bare suspicion of manslaughter or other inferior homicide; 15. Such persons being charged with petit larceny or any felony not before specified; or, 16. With being accessary to any felony. Lastly, it is agreed that **the Court of King's Bench (or any judge thereof in time of vacation) may bail for any crime whatsoever,**[5] be it treason, murder, or any other offence, according to the circumstances of the case; except only, even to this high jurisdiction, and of course to all inferior ones, such persons as are committed by either house of parliament so long as the session last, or such as are committed for contempts by any of the king's superior courts of justice. [300]

Upon the whole, if the offence be not bailable or the party cannot find bail, he is to be committed to the county gaol

5. The power to admit to bail is a judicial power. It cannot be exercised by a clerk or other ministerial officer nor can it be delegated. Clark's Crim. Proced., 84.

In this country capital offences are not generally regarded as bailable; at least after indictment or when the party is charged by the finding of a coroner's jury. Cooley's Const. Lim. (7th Ed.), 438; Clark's Crim. Proced., 86. See the United States (8th Amend.) and state constitutions.

by the mittimus of the justice, or warrant under his hand and seal, containing the cause of his commitment, there to abide till delivered by due course of law.[6] But this imprisonment, as has been said, is only for safe custody, and not for punishment; therefore in his dubious interval between the commitment and trial, a prisoner ought to be used with the utmost humanity, and neither be loaded with needless fetters nor subjected to other hardships than such as are absolutely requisite for the purpose of confinement only, — though what are so requisite must too often be left to the discretion of the gaolers. Yet the law (as formerly held) [and so now in this country] would not justify them in fettering a prisoner, unless where he was unruly or had attempted to escape.[7]

6. See Clark's Crim. Proced., 100, as to the requisites of a *mittimus* or commitment.

7. Clark's Crim. Proced., 77; State v. Lewis, 19 Kan. 260.

CHAPTER XXIII.

OF THE SEVERAL MODES OF PROSECUTION.

The next step toward the punishment of offenders is their prosecution, or the manner of their formal accusation. [301] And this is either upon a previous finding of the fact by an inquest or grand jury, or without such previous finding. The former way is either by *presentment* or *indictment*.

I. **A presentment, generally taken,** is a very comprehensive term, including not only presentments properly so called, but also inquisitions of office, and indictments by a grand jury. **A presentment, properly speaking,** is the notice taken by a grand jury of any offence from their own knowledge or observation, without any bill of indictment laid before them at the suit of the king,[1] — as the presentment of a nuisance, a libel, and the like, upon which the officer of the court must afterwards frame an indictment before the party presented can be put to answer it. **An inquisition of office** is the act of a jury sommoned by the proper officer to inquire of matters relating to the crown upon evidence laid before them. Some of these are in themselves convictions, and cannot afterwards be traversed or denied, and therefore the inquest or jury ought to hear all that can be alleged on both sides. Of this nature are all inquisitions of *felo de se*,[2] of flight in persons accused of felony, of deodands, and the like, and presentments of petty offences in the sheriff's tourn or court-leet, whereupon the presiding officer may set a fine. Other inquisitions may be afterwards traversed and examined, as particularly the coroner's inquisition of the death of a man, when it finds any one guilty of homicide; for in such cases the offender so presented must be arraigned upon this inquisition, and may dispute the truth of it, which brings it to a kind of indictment, the most usual and effectual means of prosecution, and into which we will therefore inquire a little more minutely. [302]

1. Clark's Crim. Proced., 105. 2. A suicide.

II. **An indictment is a written accusation of one or more persons of a crime or misdemeanor, preferred to and presented upon oath by a grand jury.**[3] To this end the sheriff of every county is bound to return to every session of the peace, and every commission of *oyer* and *terminer,* and of general gaol-delivery, twenty-four good and lawful men of the county, some out of every hundred, to inquire, present, do, and execute all those things which on the part of our lord the king shall then and there be commanded them. **As many as appear upon this panel are sworn upon the grand jury, to the amount of twelve at the least, and not more than twenty-three;**[4] that twelve may be a majority. This grand jury are previously instructed in the articles of their inquiry by a **charge from the judge** who presides upon the bench. [303] They then withdraw, to sit and receive **indictments,** which are preferred to them in the name of the king, but at the suit of any private prosecutor. And they are only to hear evidence on behalf of the prosecution; for the finding of an indictment is only in the nature of an inquiry or accusation, which is afterwards to be tried and determined, and the grand jury are only to inquire upon their oaths whether there be sufficient cause to call upon the party to answer it. A grand jury, however, ought to be thoroughly persuaded of the truth of an indictment so far as their evidence goes, and not to rest satisfied merely with remote probabilities.

The grand jury are sworn to inquire only for the body of the county, *pro corpore comitatus;* and therefore they cannot regularly inquire of a fact done out of that county for which they are sworn, unless particularly enabled by an act of parliament. And to so high a nicety was this matter anciently carried, that where a man was wounded in one county and died in another, the offender was at common law indictable in neither, because no complete act of felony

3. Clark's Crim. Proced., 105.

4. The manner of selecting and summoning a grand jury is in this country always, so far as we know, regulated by statute. The general procedure is very similar to that described by the author. See Rev. Stat. Ill. (Starr & Curtis), p. *1388, § 586, p. 2388, § 9; Clark's Crim. Proced., 109; Wash. Crim. Law (3d Ed.), 120.

was done in any one of them; but by statute 2 & 3 Edw. VI. c. 24, he is now indictable in the county where the party died. And by statute 2 Geo. II. c. 21, if the stroke or poisoning be in England, and the death upon the sea or out of England, or *vice versa*, the offenders and their accessaries may be indicted in the county where either the death, poisoning, or stroke shall happen. And so in some other cases, as particularly where treason is committed out of the realm, it may be inquired of in any county within the realm, as the king shall direct, in pursuance of statutes 26 Hen. VIII. c. 13; 33 Hen. VIII. c. 23; 35 Hen. VIII. c. 2; and 5 & 6 Edw. VI. c. 11. But in general all offences must be inquired into as well as tried in the county where the fact is committed. [305] Yet if larceny be committed in one county and the goods carried into another, the offender may be indicted in either, for the offence is complete in both. Or he may be indicted in England for larceny in Scotland, and carrying the goods with him into England, or *vice versa;* or for receiving in one part of the United Kingdom goods that have been stolen in another. But for robbery, burglary, and the like, he can only be indicted where the fact was actually committed; for though the carrying away and keeping of the goods is a continuation of the original taking, and is therefore larceny in the second county, yet it is not a robbery or burglary in that jurisdiction.

When the grand jury have heard the evidence, if they think it a groundless accusation, they used formerly to indorse on the back of the bill, "*ignoramus*," or we know nothing of it; intimating that though the facts might possibly be true, that truth did not appear to them. But now they assert in England more absolutely, "not a true bill," or (which is the better way) "**not found,**" and then the party is discharged without further answer; but a fresh bill may afterwards be preferred to a subsequent grand jury. If they are satisfied of the truth of the accusation they then indorse upon it, "**a true bill,**" anciently, "*billa vera.*" [306] The indictment is then said to be found, and the party stands indicted. But to find a bill there must at

least twelve of the jury agree,[5] for so tender is the law of England of the lives of the subjects, that no man can be convicted at the suit of the king of any capital offence unless by the unanimous voice of twenty-four of his equals and neighbors; that is, by twelve at least of the grand jury, in the first place, assenting to the accusation, and afterwards by the whole petit jury, of twelve more, finding him guilty upon his trial. But if twelve of the grand jury assent, it is a good presentment, though some of the rest disagree. **And the indictment when so found is publicly delivered into court.**[6]

Indictments must have a precise and sufficient certainty. By statute 1 Hen. V. c. 5, all indictments must set forth the Christian name, surname, and addition of the state, and degree, mystery, town or place, and the county[7] of the offender; and all this to identify his **person.** The **time** and **place** are also to be ascertained by naming the day and township in which the fact was committed; though a mistake in these points is in general not held to be material, provided the *time* be laid previous to the finding of the indictment, and the *place* to be within the jurisdiction of the court, unless where the place is laid not merely as a *venue,* but as part of the description of the fact. But sometimes the *time* may be very material, where there is any limitation in point of time assigned for the prosecution of offenders; and in case of murder, the time of the death must be laid within a year and a day after the mortal stroke was given. **The offence** itself must also be set forth with clearness and certainty, and in some crimes particular **words of art** must be used, which are so appropriated by the law to express the precise idea which it entertains of the offence, that no other words, however synonymous they may seem, are capable of doing it. [307] Thus, in **treason** the facts must be laid to

5. Clark's Crim. Proced., 110, 114.

6. It must be returned into open court. Gardner v. People, 3 Scam. 83; s. c., 20 Ill. 430; Aylesworth v. People, 65 Ill. 301; Clark's Crim. Proced., 115.

7. Statutes of limitation do not bind the state unless expressly named. Statutes will be found, however, in many states expressly limiting the time within which certain offences must be prosecuted.

be done "treasonably and against his allegiance,"— anciently, "*proditorie et contra ligeantiae suae debitum*,"[8] — else the indictment is void. In indictments for **murder**, it is necessary to say that the party indicted "murdered," not "killed" or "slew," the other, which till the late statute was expressed in Latin by the word "*murdravit*." In all indictments for **felonies** the adverb "feloniously," "*felonice*," must be used, and for **burglaries** also "*burglariter*," or in English, "burglariously;" and all these to ascertain the intent. In **rapes**, the word "*rapuit*," or "ravished," is necessary, and must not be expressed by any periphrasis, in order to render the crime certain. So in **larcenies** also, the words "*felonice cepit et asportavit*, feloniously took and carried away," are necessary to every indictment, for these only can express the very offence. Also in indictments for murder the length and depth of the wound should in general be expressed, in order that it may appear to the court to have been of a mortal nature; but if it goes through the body, then its dimensions are immaterial, for that is apparently sufficient to have been the cause of the death. Also, where a limb or the like is absolutely cut off, there such description is impossible. Lastly, in indictments, the **value of the thing** which is the subject or instrument of the offence must sometimes be expressed. In indictments for larcenies this is necessary, that it may appear whether it be grand or petit larceny, and whether entitled or not to the benefit of clergy; in homicide of all sorts it is necessary, as the weapon with which it is committed is forfeited to the king as a deodand.

The remaining methods of prosecution are without any previous finding by a jury, to fix the authorative stamp of verisimilitude upon the accusation.

One of these by the common law was when a thief was taken *with the mainor*, that is, with the thing stolen upon him *in manu*. For he might

8. Traitorously and contrary to the duty of his allegiance.

The form and requisites of indictments will be found treated in chapters 5-9 of Clark's Criminal Procedure, pp. 137-326. The subject is too voluminous to be even abstracted here. See, also, a summary of criminal procedure in Wash. Crim. Law (3d Ed.), 104-268.

when so detected *flagrante delicto* be brought into court, arraigned, and tried, without indictment. [308] [Repealed.]

The only species of proceeding at the suit of the king, without a previous indictment or presentment by a grand jury, now seems to be that of *information*.

III. **Informations are of two sorts:** *first*, those which are partly at the suit of the king, and partly at that of a subject; and *secondly*, such as are only in the name of the king. The former are usually brought upon penal statutes, which inflict a penalty upon conviction of the offender, one part to the use of the king and another to the use of the informer, and are a sort of *qui tam* actions only carried on by a criminal instead of a civil process.

The informations that are exhibited in the name of the king alone are also of two kinds: *first*, those which are truly and properly his own suits, and filed *ex officio* by his own immediate officer, the Attorney-General; *secondly*, those in which, though the king is the nominal prosecutor, yet it is at the relation of some private person or common informer; and they are filed by the king's coroner and attorney in the Court of King's Bench, usually called the master of the crown-office, who is for this purpose the standing officer of the public. The objects of the king's own prosecutions, filled *ex officio* by his own Attorney-General, are properly such enormous misdemeanors as peculiarly tend to disturb or endanger his government, or to molest or affront him in the regular discharge of his royal functions. [309] The objects of the other species of informations filed by the master of the crown-office upon the complaint or relation of a private subject, are any gross and notorious misdemeanors, riots, batteries, libels, and other immoralities of an atrocious kind, not peculiarly tending to disturb the government (for those are left to the care of the Attorney-General), but which, on account of their magnitude or pernicious example, deserve the most public animadversion. And when an information is filed, either thus or by the Attorney-General *ex officio*, it must be tried by a petit jury of the county where the offence arises; after which, if the de-

fendant be found guilty, the court must be resorted to for his punishment.

But these informations (of every kind) are confined by the constitutional law to mere misdemeanors only;[9] for whenever any capital offence is charged, the same law requires that the accusation be warranted by the oath of twelve men before the party shall be put to answer it. [310]

There is one species of information still further regulated by statute 9 Anne, c. 20, viz., **those in the nature of a writ of quo warranto,** which was shown in the preceding book to be a remedy given to the crown against such as had usurped or intruded into any office or franchise.[1] [312] The modern information tends to the same purpose as the ancient writ, being generally made use of to try the civil rights of such franchises, though it is commenced in the same manner as other informations are, by leave of the court or at the will of the Attorney-General, being properly a criminal prosecution, in order to fine the defendant for his usurpation, as well as to oust him from his office, yet usually considered at present as merely a civil proceeding.

These are all the methods of prosecution at the suit of the king. There yet remains another, which is merely at the suit of the subject, and is called an *appeal.*

IV. **An appeal** [abolished by statute], in the sense wherein it is here used, does not signify any complaint to a superior court of an injustice done by an inferior one, which is the general use of the word; but it here means an original suit at the time of its first commencement. An appeal, therefore, when spoken of as a criminal prosecution, denotes an accusation by a private subject against another for some heinous crime demanding punishment on account of the particular injury suffered, rather than for the offence against the public. [See Ashford v. Thornton, 1 B. & Ald. 405 (1818).]

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9. Clark's Crim. Proced., 127. By the U. S. Const. (amend. art. 5) "no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury," etc.; and many of the state constitutions contain the same provision. Clark's Crim. Proced., 107; Cooely's Const. Lim. (7th Ed.), 436.

In Michigan informations are in general use instead of indictments, though the court may order the summoning of a grand jury if deemed necessary.

1. See *ante.*

CHAPTER XXIV.

OF PROCESS UPON AN INDICTMENT.

We have hitherto supposed the offender to be in custody before the finding of the indictment, in which case he is immediately (or as soon as convenience permits) to be arraigned thereon. [318] But if he hath fled, or secretes himself, in capital cases, or hath not, in smaller misdemeanors, been bound over to appear at the assises or sessions, still **an indictment may be preferred against him in his absence,** since, were he present, he could not be heard before the grand jury against it. And if it be found, then process must issue to bring him into court, for **the indictment cannot be tried unless he personally appears,** according to the rules of equity in all cases and the express provision of statute 28 Edw. III. c. 3, in capital ones, that no man shall be put to death without being brought to answer by due process of law.

The proper process on an indictment for any petit misdemeanor or on a penal statute is a writ of *venire facias,* which is in the nature of a summons to cause the party to appear. And if by the return to such *venire* it appears that the party hath lands in the county whereby he may be distrained, then a *distress infinite* shall be issued from time to time till he appears. But if the sheriff returns that he hath no lands in his bailiwick, then upon his non-appearance a writ of *capias* shall issue, which commands the sheriff to take his body and have him at the next assises, and if he cannot be taken upon the first *capias,* a second and third shall issue, called an *alias* and a *pluries capias.* [319] **But on indictments for treason or felony** a *capias* is the first process. And so, **in the case of misdemeanors,** it is now the usual practice for any judge of the Court of King's Bench, upon certificate of an indictment found, to award a writ of *capias* immediately, in order to bring in the defendant.[1]

1. A warrant issues in such case of course in this country. See Clark's Crim. Proced., 22; Wash. Crim. Law (3d Ed.), 173.

But if he absconds, and it is thought proper to pursue him to an outlawry, then a greater exactness is necessary. For in such case, after the several writs have issued in a regular number, according to the nature of the respective crimes, without any effect, the offender shall be put in the *exigent* in order to his outlawry; that is, he shall be exacted, proclaimed, or required to surrender, at five county courts. And if he be returned *quinto exactus*, and does not appear at the fifth exaction or requisition, then he is adjudged to be *outlawed*, or put out of the protection of the law; so that he is incapable of taking the benefit of it in any respect, either by bringing actions or otherwise.

The **punishment** for outlawries upon indictments for misdemeanors is the same as for outlawries upon civil actions, viz., forfeiture of goods and chattels. But an outlawry in treason or felony amounts to a conviction and attainder of the offence charged in the indictment, as much as if the offender had been found guilty by his country. His life is, however, still under the protection of the law, and it is holden that no man is entitled to kill him wantonly or willfully, but in so doing is guilty of murder, unless it happens in the endeavor to apprehend him. [320]

CHAPTER XXV.

OF ARRAIGNMENT AND ITS INCIDENTS.

When the offender either appears voluntarily to an indictment, or was before in custody, or is brought in upon criminal process to answer it in the proper court, he is immediately to be *arraigned* thereon, which is the fifth stage of criminal prosecution. [322]

To arraign is nothing else but to call the prisoner to the bar of the court, to answer the matter charged upon him in the indictment.[1] The prisoner is to be called to the bar by his name, and it is laid down in our ancient books that, though under an indictment of the highest nature, he must be brought to the bar without irons or any manner of shackles or bonds, unless there be evident danger of an escape, and then he may be secured with irons. But yet in Layer's case, A. D. 1722, a difference was taken between the time of arraignment and the time of trial, and accordingly the prisoner stood at the bar in chains during the time of his arraignment.[2]

When he is brought to the bar he is called upon by name to hold up his hand, which, though it may seem a trifling circumstance, yet is of this importance, that by the holding up of his hand *constat de persona*,[3] and he owns himself to be of that name by which he is called. [323] However, it is not an indispensable ceremony, for, being calculated merely for the purpose of identifying the person, any other acknowledgment will answer the purpose as well; therefore if the prisoner obstinately and contemptuously refuses to hold up his hand, but confesses he is the person named, it is fully sufficient.

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1. Clark's Crim. Proced., 366.

2. In Waite's Case, Leach, 34, 43, the prisoner at the time of his arraignment desired that his irons might be taken off; but the court informed him that they had no authority for that purpose until the jury were charged to try him. With us he is freed from chains or fetters, unless such restraint is necessary. Wash. Crim. Law (3d Ed.), 127; Clark's Crim. Proced., 368.

3. It identifies the person. It is not customary with us. Clark's Crim. Proced., 368.

Then the indictment is to be read to him distinctly in the English tongue (which was law, even while all other proceedings were in Latin), that he may fully understand his charge. After which it is to be demanded of him whether he be guilty of the crime whereof he stands indicted, or not guilty.[4] **By the old common law the accessary could not be arraigned till the principal was attainted, unless he chose it,** for he might waive the benefit of the law, and, therefore, principal and accessary might, and may still be arraigned, and plead, and also be tried together. But otherwise, if the principal had never been indicted at all and stood mute, had challenged above thirty-five jurors peremptorily, had claimed the benefit of clergy, had obtained a pardon, or had died before attainder, the accessary in any of these cases could not be arraigned, for *non constitit*[5] whether any felony was committed or no, till the principal was attainted; and it might so happen that the accessary should be convicted one day, and the principal acquitted the next, which would be absurd. However, this absurdity could only happen where it was possible that a trial of the principal might be had subsequent to that of the accessary, and therefore the law still continues that the accessary shall not be tried so long as the principal remains liable to be tried hereafter. But by statute 1 Anne, c. 9, if the principal be once convicted, and before attainder (that is, before he receives judgment of death or outlawry) he is delivered by pardon, the benefit of clergy, or otherwise, or if the principal stands mute, or challenges peremptorily above the legal number of jurors so as never to be convicted at all: in any of these cases, in which no subsequent trial can be had of the principal, the accessary may be proceeded against as if the principal felon had been attainted, for there is no danger of future contradiction. [324] And upon the trial of the accessary, as well after as before the conviction of the principal, it seems to be the better opinion, and founded on the true spirit of justice, that the accessary is at liberty, if he can, to controvert the guilt of his supposed principal, and

4. Clark's Crim. Proced., 368.

5. It did not appear.

to prove him innocent of the charge, as well in point of fact as in point of law.

When a criminal is arraigned, he either stands mute or confesses the fact, which circumstances we may call *incidents* to the arraignment; **or else he pleads to the indictment,** which is to be considered as the next stage of proceedings. But first let us observe these incidents to the arraignment, of standing mute or confession.

I. **Regularly a prisoner is said to stand mute** when, being arraigned for treason or felony, he either, 1. Makes no answer at all; or 2. Answers foreign to the purpose, or with such matter as is not allowable, and will not answer otherwise; or 3. Upon having pleaded not guilty, refuses to put himself upon the country. If he says nothing, the court ought *ex officio* to impanel a jury to inquire whether he stands obstinately mute, or whether he be dumb *ex visitatione Dei*.[6] If the latter appears to be the case, the judges of the court (who are to be of counsel for the prisoner, and to see that he hath law and justice) shall proceed to the trial, and examine all points as if he had pleaded not guilty. But whether judgment of death can be given against such a prisoner who hath never pleaded, and can say nothing in arrest of judgment, is a point yet undetermined. [325]

If he be found to be obstinately mute (which a prisoner hath been held to be that hath cut out his own tongue), then, if it be on an indictment of **high treason,** it hath long been clearly settled that standing mute is an equivalent to a conviction, and he shall receive the same judgment and execution. And as in this the highest crime, so also in the lowest species of felony, viz., **in petit larceny and in all misdemeanors,** standing mute hath always been equivalent to conviction. **But upon appeals or indictments for other felonies, or petit treason,** the prisoner was not by the ancient law looked upon as convicted so as to receive judgment for the felony, but should for his obstinacy have received the terrible sentence of *penance*, or *peine* (which was probably nothing more than a corrupted abbreviation of *prisone*) *forte et dure*.[7]

The English judgment of penance for standing mute was as follows: that the prisoner be remanded to the prison from whence he came, and put into a low dark chamber, and there be laid on his back on the bare floor, naked, unless where decency forbids; that there be placed upon his body as great a weight of iron as he could bear, and more; that he have no sustenance, save only, on the first day three morsels of the worst bread, and on the second day three draughts of standing water, that should be nearest to the prison door; and in this situation this should be alternately his daily diet *till he died*, or (as anciently the judgment ran) *till he answered*. [327]

6. By visitation of God.

7. Strong and hard.

The law was, that by standing mute and suffering this heavy penance the judgment, and of course the corruption of the blood and escheat of the *lands*, were saved in felony and petit treason, though not the forfeiture of the *goods*, and therefore this lingering punishment was probably introduced in order to extort a plea, without which it was held that no judgment of death could be given, and so the lord lost his escheat. [329] But very lately, to the honor of our laws, it hath been enacted by statute 12 Geo. III. c. 20, that every person who, being arraigned for felony and piracy, shall stand mute or not answer directly to the offence, shall be convicted of the same, and the same judgment and execution (with all their consequences in every respect) shall be thereupon awarded as if the person had been convicted by verdict or confession of the crime.[8]

II. The other incident to arraignments, exclusive of the plea, is the prisoner's actual **confession of the indictment.** Upon a simple and plain confession the court hath nothing to do but to award judgment; but it is usually very backward in receiving and recording such confession, out of tenderness to the life of the subject, and will generally advise the prisoner to retract it and plead to the indictment.[9]

Approvement is when a person indicted of treason or felony and arraigned for the same doth confess the fact before plea pleaded, and appeals or accuses others, his accomplices, in the same crime, in order to obtain his pardon. [330] In this case he is called an *approver* or prover, *probator*, and the party appealed or accused is called the *appellee*. Such approvement can only be in capital offences, and it is, as it were, equivalent to an indictment, since the appellee is equally called upon to answer it. And if he hath no reasonable and legal exceptions to make to the person of the approver, which indeed are very numerous, he must put himself upon his trial, either by battle or by the country, and if vanquished or found guilty must suffer the judgment of the law, and the approver shall have his pardon *ex debito justitiae*.[1] On the other hand, if the appellee be conqueror or acquitted by the jury, the approver shall receive judgment to be hanged, upon his own confession of the indictment; for the condition of his pardon has failed, viz., the conviction of some other person, and therefore his conviction remains absolute.

8. In this country, when the defendant refuses to plead, a plea of "not guilty" is entered for him; and such is now the practice in England. See Clark's Crim. Proced., 369.

9. See Wash. Crim. Law (3d Ed.), 132.

1. As a debt to justice.

But it is purely in the discretion of the court to permit the approved thus to appeal or not and, in fact, this course of admitting approvements hath been long disused.

It hath been usual for the justices of the peace, by whom any person charged with felony are committed to gaol, to admit some one of their accomplices to become a witness (or, as it is generally termed, **king's evidence**) against his fellows, upon an implied confidence, which the judges of gaol-delivery have usually countenanced and adopted, that if such accomplice makes a full and complete discovery of that and of all other felonies to which he is examined by the magistrate, and afterwards gives his evidence without prevarication or fraud, he shall not himself be prosecuted for that or any other previous offence of the same degree.[2]

2. See, however, as to other previous offences of the same degree, Mrs. Rudd's Case, Cowp. 341. The practice stated in the text is common in this country.

CHAPTER XXVI.

OF PLEA, AND ISSUE.

The plea of the prisoner, or defensive matter alleged by him on his arraignment, if he does not confess or stand mute, is either, 1. **A plea to the jurisdiction;** 2. **A demurrer;** 3. **A plea in abatement;** 4. **A special plea in bar;** or 5. **The general issue.** [332]

I. **A plea to the jurisdiction** is where an indictment is taken before a court that hath no cognizance of the offence, as if a man be indicted for a rape at the sheriff's tourn, or for treason at the quarter sessions; in these or similar cases he may except to the jurisdiction of the court without answering at all to the crime alleged.[1] [333]

II. **A demurrer to the indictment** is incident to criminal cases as well as civil when the fact alleged is allowed to be true, but the prisoner joins issue upon some point of law in the indictment, by which he insists that the fact, as stated, is no felony, treason, or whatever the crime is alleged to be.[2] [334] If on demurrer the point of law be adjudged *against* the prisoner, in such case he shall be directed and received to plead the general issue, not guilty, after a demurrer determined against him. [This rule holds good in indictments for felonies, but not for misdemeanors.]

Demurrers to indictments are seldom used, since the same advantages may be taken upon a plea of not guilty, or afterwards in arrest of judgment, when the verdict has established the fact.

III. **A plea in abatement** is principally for a *misnomer*, a wrong name or false addition to the prisoner. As, if *James* Allen, *gentleman,* is indicted by the name of *John* Allen, *esquire,* he may plead that he has the name of James and not of John, and that he is a gentleman and not an esquire.

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1. Seldom used, as the objection may be taken otherwise. Clark's Crim. Proced., 375.

2. Clark's Crim. Proced., 379. A motion to quash the indictment is more common than a demurrer. See Clark's Crim. Proced., 362.

And if either fact is found by a jury, then the indictment shall be abated, as writs or declarations may be in civil actions. [335] But in the end there is little advantage accruing to the prisoner by means of these dilatory pleas, because if the exception be allowed a new bill of indictment may be framed, according to what the prisoner in his plea avers to be his true name and addition. For it is a rule upon all pleas in abatement that he who takes advantage of a flaw must at the same time show how it may be amended.[3]

IV. **Special pleas in bar** go to the merits of the indictment, and give a reason why the prisoner ought not to answer it at all, nor put himself upon his trial for the crime alleged. These are of four kinds: **a former acquittal, a former conviction,**[4] **a former attainder,** or **a pardon.** There are many other pleas which may be pleaded in bar of an appeal, but these are applicable to both appeals and indictments.

1. *First,* the plea of *autrefoits acquit,* or **a former acquittal,** is grounded on this universal maxim of the common law of England, that **no man is to be brought into jeopardy of his life more than once for the same offence.**[5] And hence it is allowed as a consequence, that when a man is once fairly found not guilty upon any indictment or other prosecution, before any court having competent jurisdiction of the offence, he may plead such acquittal in bar of any subsequent accusation for the same crime.

2. *Secondly,* the plea of *autrefoits convict,* or a **former conviction** for the same identical crime, though no judgment was ever given, or perhaps will be (being suspended by the benefit of clergy or other causes), is a good plea in bar to an indictment. [336] And this depends upon the same principle as the former, that no man ought to be twice brought in danger of his life for one and the same crime. Hereupon it has been held that a conviction of manslaughter on an appeal or an indictment is a bar even in another appeal, and

3. See, generally, Clark's Crim. Proc., 377.

4. Clark's Crim. Proced., 382. Guaranteed by constitution in this country.

5. A man is in jeopardy when a jury has been sworn to try the cause. Id., 384.

much more in an indictment of murder, for the fact prosecuted is the same in both, though the offences differ in coloring and in degree.

3. *Thirdly,* the plea of *autrefoits attaint,* or **a former attainder,**[6] which is a good plea in bar, whether it be for the same or any other felony. For wherever a man is attainted of felony, by judgment of death either upon a verdict or confession, by outlawry, or heretofore by abjuration, and whether upon an appeal or an indictment, he may plead such attainder in bar to any subsequent indictment or appeal for the same or for any other felony. And this because, generally, such proceeding on a second prosecution cannot be to any purpose, for the prisoner is dead in law by the first attainder, his blood is already corrupted, and he hath forfeited all that he had, so that it is absurd and superfluous to endeavor to attaint him a second time.

4. *Lastly,* **a pardon** may be pleaded in bar as at once destroying the end and purpose of the indictment by remitting that punishment which the prosecution is calculated to inflict.[7] [337] There is one advantage that attends pleading a pardon in bar or in arrest of judgment *before* sentence is passed, which gives it by much the preference to pleading it *after* sentence or attainder. This is, that by stopping the judgment it stops the attainder and prevents the corruption of the blood, which, when once corrupted by attainder, cannot afterwards be restored otherwise than by act of parliament. But as the title of pardons is applicable to other stages of prosecution, and they have their respective force and efficacy as well after as before conviction, outlawry, or attainder, I shall therefore reserve the more minute considerations of them till I have gone through every other title except only that of execution. [338]

In criminal prosecutions *in favorem vitae,*[8] as well upon appeal as indictment, when a prisoner's plea in bar is found against him upon issue tried by a jury, or adjudged against

6. Not applicable to this country.

7. Clark's Crim. Proced., 407.

"A pardon to be valid must be delivered and accepted; it may be partial or on condition precedent or subsequent; it is voidable for fraud on the pardoning power. A full pardon, although it cannot affect vested rights, absolves the party from all the legal consequences of his crime." Wash. Crim. Law (3d Ed.), 204; Logan v. United States, 144 U. S. 263; Edwards v. Com., 78 Va. 39.

8. In favor of life.

him in point of law by the court, still he shall not be concluded or convicted thereon, but shall have judgment of **respondeat ouster**,[9] and may plead over to the felony the general issue, not guilty.

V. **The general issue**, or plea of *not guilty*, upon which plea alone the prisoner can receive his final judgment of death. In case of an indictment of felony or treason there can be no special justification put in by way of plea. As on an indictment for murder a man cannot *plead* that it was in his own defence against a robber on the highway or a burglar, but he must plead the general issue, not guilty, and give this special matter in evidence. For (besides that these pleas do in effect amount to the general issue, since, if true, the prisoner is most clearly not guilty) as the facts in treason are laid to be done *proditorie et contra ligeantiae suae debitum*,[1] and in felony that the killing was done *felonice*, these charges of a traitorous or felonious intent are the points and very *gist* of the indictment, and must be answered directly by the general negative, not guilty; and the jury upon the evidence will take notice of any defensive matter, and give their verdict accordingly as effectually as if it were or could be specially pleaded. [339] So that this is upon all accounts the most advantageous plea for the prisoner.

When the prisoner hath thus pleaded not guilty (*non culpabilis*, or *nient culpable*), which was formerly used to be abbreviated upon the minutes thus: "*non* (or *nient*) *cul.*," the clerk of the assise or clerk of the arraigns, on behalf of the crown, replies that the prisoner is guilty, and that he is ready to prove him so. This is done by two monosyllables in the same spirit of abbreviation, "*cul. prit.*," which signifies first that the prisoner is guilty (*cul. culpable*, or *culpabilis*), and then that the king is ready to prove him so (*prit praesto sum*, or *paratus verificare*). This is therefore a replication on behalf of the king *viva voce* at the bar. By this replication the king and the prisoner are therefore at issue.[2]

9. Let him answer over.

1. Traitorously and contrary to the duty of his allegiance.

2. A plea of not guilty denies every fact and circumstance necessary to prove the defendant guilty of the crime charged. Clark's Crim. Proced., 408.

The joining of issue, which, though now usually entered on the record, is not otherwise joined in any part of the proceedings, seems to be clearly the meaning of this obscure expression, which has puzzled our most ingenious etymologists, and is commonly understood as if the clerk of the arraigns, immediately on plea pleaded, had fixed an opprobrious name on the prisoner by asking him, "*culprit,* how wilt thou be tried?" For immediately upon issue joined it is inquired of the prisoner by what trial he will make his innocence appear. [340] This form has at present reference to appeals and approvements only wherein the appellee has his choice either to try the accusation by battle or by jury. [341] **But upon indictments, since the abolition of ordeal, there can be no other trial but by jury,** *per pais,* or by the country; and therefore, if the prisoner refuses to put himself upon the inquest in the usual form, — that is, to answer that he will be tried by God and the country, if a commoner, and if a peer, by God and his peers, — the indictment, if in treason, is taken *pro confesso;* and the prisoner, in cases of felony, is adjudged to stand mute, and if he perseveres in his obstinacy shall now be convicted of the felony.[3]

When the prisoner has thus put himself upon his trial, the clerk answers in the humane language of the law, which always hopes that the party's innocence rather than his guilt may appear, "God send thee a good deliverance." And then they proceed as soon as conveniently may be to the trial.

3. Plea of "not guilty" is now entered for him.

CHAPTER XXVII.

OF TRIAL AND CONVICTION.

I. The most ancient species of trial was that by **ordeal,** which was peculiarly distinguished by the appellation of *judicium Dei,*[1] and sometimes *vulgaris purgatio,*[2] to distinguish it from the canonical purgation, which was by the oath of the party. [342] This was of two sorts, either **fire-ordeal** or **water-ordeal;** the former being confined to persons of higher rank, the latter to the common people. Both these might be performed by deputy, but the principal was to answer for the success of the trial, the deputy only venturing some corporal pain for hire, or perhaps for friendship. **Fire-ordeal** was performed either by taking up in the hand, unhurt, a piece of red-hot iron of one, two, or three pounds weight, or else by walking barefoot and blindfold over nine red-hot ploughshares laid lengthwise at unequal distances; and if the party escaped being hurt he was adjudged innocent; but if it happened otherwise, as without collusion it usually did, he was then condemned as guilty. [343]

Water-ordeal was performed either by plunging the bare arm up to the elbow in boiling water and escaping unhurt thereby, or by casting the person suspected into a river or pond of cold water; and if he floated therein without any action of swimming, it was deemed an evidence of his guilt, but if he sank he was acquitted.

II. Another species of purgation, somewhat similar to the former, but probably sprung from a presumptuous abuse of revelation in the ages of dark superstition, was the *corsned,* or **morsel of execration,** being a piece of cheese or bread of about an ounce in weight, which was consecrated with a form of exorcism, desiring of the Almighty that it might cause convulsions and paleness and find no passage if the man was really guilty, but might turn to health and nourishment if he was innocent. [345]

These two antiquated methods of trial were principally in use among our Saxon ancestors. The next, which still remains in force, though very rarely in use, owes its introduction among us to the princes of the Norman line, and that is, —

III. **The trial by battle,** duel, or single combat [abolished], which was another species of presumptuous appeals to Providence, under an expectation that Heaven would unquestionably give the victory to the innocent or injured party. The trial by battel may be demanded at the

1. Judgment of God.

2. Common purgation.

election of the appellee in either an appeal or an approvement; and it is carried on with equal solemnity as that on a writ of right, but with this difference, that there each party might hire a champion, but here they must fight in their proper persons.[3]

IV. The fourth method of trial used in criminal cases is that **by the peers of Great Britain, in the Court of Parliament, or the Court of the Lord High Steward,** when a peer is capitally *indicted* [for treason or felony or a misprison of either]; for in case of an *appeal* [or other criminal prosecution] a peer shall be tried by jury. [348] In the method and regulation of its proceedings it differs little from the trial *per patriam* or by jury, except that no special verdict can be given in the trial of a peer, and except also that the peers need not all agree in their verdict; but the greater number, consisting of twelve at the least, will conclude and bind the minority. [349]

V. **The trial by jury,** or the country, *per patriam,* is also that trial by the peers of every Englishman which, as the grand bulwark of his liberties, is secured to him by the Great Charter: *"Nullus liber homo capiatur, vel imprisonetur, aut exulet, aut aliquo alio modo destruatur, nisi per legale judicium parium suorum, vel per legem terrae."*[4]

The antiquity and excellence of this trial for the settling of civil property has before been explained at large. And it will hold much stronger in criminal cases, since in times of difficulty and danger more is to be apprehended from the violence and partiality of judges appointed by the crown in suits between the king and the subject than in disputes between one individual and another to settle the metes and boundaries of private property.

When a prisoner on his arraignment has pleaded not guilty, and for his trial hath put himself upon the country, which country the jury are, the sheriff of the county must return a panel of jurors, *liberos et legales homines, de vicineto;*[5] that is, freeholders, without just exception, and of the *visne* or neighborhood, which is interpreted to be of the county where the fact is committed. [350]

In cases of high treason, whereby corruption of blood may

3. See Ashford v. Thornton, 1 B. & Ald. 405 (1818).

4. No freeman shall be taken, or imprisoned, or exiled, or in any other way destroyed, unless by the legal judgment of his peers or by the law of the land.

5. Free and lawful men of the neighborhood.

ensue (except treason in counterfeiting the king's coin or seals), or misprision of such treason, it is enacted by statute 7 W. III. c. 3, that the prisoner shall have **a copy of the indictment** (which includes the caption), but not the names of the witnesses, five days at least before the trial, that is, upon the true construction of the act, before his arraignment, for then is the time to take any exceptions thereto, by way of plea or demurrer; that he shall also have **a copy of the panel of jurors** two days before his trial; and that he shall have the same **compulsive process to bring in his witnesses** *for* him as was usual to compel their appearance *against* him. [351] And by statute 7 Anne, c. 21 (which did not take place till after the decease of the late Pretender), all persons indicted for high treason or misprision thereof shall have not only a copy of the indictment, but a **list of all the witnesses** to be produced and of the jurors impanelled, with their professions and places of abode, delivered to him ten days before the trial, and in the presence of two witnesses, the better to prepare him to make his challenges and defence. [352] But this last act, so far as it affected indictments for the inferior species of high treason respecting the coin and the royal seals, is repealed by the statute 6 Geo. III. c. 53, else it had been impossible to have tried those offences in the same circuit in which they are indicted; for ten clear days between the finding and the trial of the indictment will exceed the time usually allotted for any session of *oyer* and *terminer*. **And no person indicted for felony is, or (as the law stands) ever can be, entitled to such copies before the time of his trial.**[6]

When the trial is called on, the jurors are to be sworn, as they appear, to the number of twelve, unless they are challenged by the party.

Challenges may here be made, either on the part of the king or on that of the prisoner, and **either to the whole**

6. In this country the defendant is by statute or constitution generally entitled to copies in every case; he is also entitled to compulsory process to bring in his witnesses and to the aid of counsel. Wash. Crim. Law (3d Ed.), 188; Cooley's Const. Lim. (7th Ed.), 47 and note; Clark's Proced., 428.

array or to the separate polls, for the very same reasons that they may be made in civil causes.[7]

Challenges for cause may be without stint in both criminal and civil trials. [353] But in criminal cases, or at least in capital ones, there is, *in favorem vitae,* allowed to the prisoner an arbitrary and capricious species of challenge to a certain number of jurors, without showing any cause at all, which is called a **peremptory challenge.** This privilege of peremptory challenges, though granted to the prisoner, is **denied to the king** by the statute 33 Edw. I. st. 4, which enacts that the king shall challenge no jurors without assigning a cause certain, to be tried and approved by the court. However, it is held that the king need not assign his cause of challenge till all the panel is gone through, and unless there cannot be a full jury without the person so challenged. And then, and not sooner, the king's counsel must show the cause, otherwise the juror shall be sworn.

The peremptory challenges of the prisoner must, however, have some reasonable boundary, otherwise he might never be tried. [354] This reasonable boundary is settled by the common law to be the number of **thirty-five**, that is, one under the number of three full juries. And it dealt with one who peremptorily challenges above thirty-five, and will not retract his challenge, as with one who stands mute or refuses his trial, by sentencing him to the *peine forte et dure* in felony, and by attainting him in treason. And so the law stands at this day with regard to treason of any kind.

But by statute 22 Hen. VIII. c. 14 (which, with regard to felonies, stands unrepealed by statute 1 & 2 Ph. & M. c. 10), no person arraigned for felony can be admitted to make any more than **twenty** peremptory challenges.[8] But how if the prisoner will peremptorily challenge twenty-one, what shall be done? The old opinion was that judgment of *peine forte et dure* should be given, as where he challenged thirty-six at the common law; but the better opinion seems to be that such challenge shall only be disregarded and overruled.

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7. See *ante.* See, also, Clarke's Crim. Proced., 438-455.

8. See Clark's Crim. Proced., 449. Wholly regulated by statute in this country. Consult the statutes and local works on Practice.

If, by reason of challenges or the default of the jurors, a sufficient number cannot be had of the original panel, a tales may be awarded, as in civil causes, till the number of twelve is sworn, "well and truly to try, and true deliverance make, between our sovereign lord the king and the prisoner whom they have in charge, and a true verdict to give, according to their evidence." [355]

When the jury is sworn, if it be a cause of any consequence, the indictment is usually opened, and the evidence marshalled, examined, and enforced by the counsel for the crown or prosecution. But it is a settled rule at common law that **no counsel shall be allowed a prisoner upon his trial upon the general issue** in any capital crime, unless some point of law shall arise proper to be debated. The judges themselves are so sensible of this defect in the law that they never scruple to allow a prisoner counsel to instruct him what question to ask, or even to ask questions for him, with respect to matters of fact; for as to matters of law arising on the trial, they are *entitled* to the assistance of counsel. [356] But, lest this indulgence should be intercepted by superior influence in the case of state-criminals, the legislature has directed by statute 7 W. III. c. 3, that persons *indicted* for such high treason as works a corruption of the blood or misprision thereof (except treason in counterfeiting the king's coin or seals) may make their full defence by counsel, not exceeding two, to be named by the prisoner and assigned by the court or judge; and the same indulgence, by statute 20 Geo. II. c. 30, is extended to parliamentary *impeachments* for high treason, which were excepted in the former act.[9]

The doctrine of evidence upon pleas of the crown is, in most respects, the same as that upon civil actions.[1] There are, however, a few leading points wherein, by several statutes and resolutions, a difference is made between civil and criminal evidence.

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9. Counsel are now allowed in all cases, both in the United States and in England.

1. Art. 3, sec. 3, U. S. Const., provides that "no person shall be convicted of treason unless on the testimony of two witnesses to the same overt act or on confession in open court."

First, **in all cases of high treason, petit treason, and misprision of treason,** by statutes 1 Edw. VI. c. 12, and 5 & 6 Edw. VI. c. 11, *two* lawful witnesses are required to convict a prisoner;[2] unless he shall willingly and without violence *confess* the same. By statute 7 W. III. c. 3, § 2, in posecutions for those treasons to which that act extends [high treason or misprision of high treason], the same rule (of requiring *two* witnesses) is again enforced, with this addition, that the *confession* of the prisoner, which shall countervail the necessity of such proof, must be in *open court.* [357] In the construction of which act it hath been holden that a confession of the prisoner, taken out of court, before a magistrate or person having competent authority to take it, and proved by two witnesses, is sufficient to convict him of treason. **But hasty, unguarded confessions,** made to persons having no such authority, ought not to be admitted as evidence under this statute. And, indeed, even in cases of felony at the common law they are the weakest and most suspicious of all testimony, ever liable to be obtained by artifice, false hopes, promises of favor, or menaces, seldom remembered accurately or reported with due precision, and incapable in their nature of being disproved by other negative evidence. By the same statute 7 W. III. it is declared that **both witnesses must be to the same overt act of treason,** or one to one overt act, and the other to another overt act of the same species of treason, and not of distinct heads or kinds, and no evidence shall be admitted to prove any overt act not expressly laid in the indictment. **But in almost every other accusation one positive witness is sufficient.**

In cases of indictments for perjury one witness is not allowed to convict a man, because then there is only one oath against another.[3] [358] **In cases of treason,** also, there is the accused's oath of allegiance to counterpoise the information of a single witness, and that may perhaps be one

2. See the subject of Evidence, treated in volume 2 of this series. See, generally, Chamberlayne's great work on this subject.

3. There must be two witnesses or one witness and other additional competent evidence sufficient to overthrow the oath of defendant. Wash. Crim. Law (3d Ed.), 223.

reason why the law requires a double testimony to convict him; though the principal reason undoubtedly is to secure the subject from being sacrificed to fictitious conspiracies, which have been the engines of profligate and crafty politions in all ages.

Secondly, though from the reversal of Colonel Sidney's attainder by act of parliament in 1689 it may be collected that the mere similitude of **handwriting** in two papers shown to a jury, without other concurrent testimony, is no evidence that both were written by the same person, yet undoubtedly the testimony of witnesses well acquainted with the party's hand, that they believe the paper in question to have been written by him, is evidence to be left to a jury.[4]

Fourthly, **all presumptive evidence of felony should be admitted cautiously,** for the law holds that it is better that ten guilty prisoners escape than that one innocent suffer. And Sir Matthew Hale in particular lays down two rules most prudent and necessary to be observed: 1. Never to convict a man for stealing the goods of a person unknown, merely because he will give no account how he came by them, unless an actual felony be proved of such goods; and 2. Never to convict any person of murder or manslaughter till at least the body be found dead, on account of two instances he mentions, where persons were executed for the murder of others who were then alive but missing.[5] [359]

Lastly, it was an ancient and commonly received practice, that as counsel was not allowed to any prisoner accused of a capital crime, so **neither should he be suffered to exculpate himself by the testimony of any witnesses.** But by the statute 7 W. III. c. 3 [the accused was allowed in his defence to examine witnesses upon oath] in cases of treason within the act; and it was afterwards declared by statute 1 Anne,

4. But the proof of handwriting is not evidence in high treason, unless the papers are found in the custody of the prisoner. See, generally, as to expert evidence on handwriting, Rogers' Expert Testimony and Lawson's Expert Testimony.

5. In all criminal prosecutions the *corpus delicti,* or the fact of the commission of the crime must be proved before attempting to fasten its commission upon the defendant. It may, however, be established by circumstantial evidence. Wash. Crim. Law (3d Ed.), 221; 1 Bish. Crim. Proced. (4th Ed.), § 1056 *et seq.*

st. 2, c. 9, that in all cases of treason and felony all witnesses *for* the prisoner should be examined upon oath in like manner as the witnesses *against* him. [360]

When the evidence on both sides is closed, and indeed when any evidence hath been given, the jury cannot be discharged (unless in cases of evident necessity) till they have given in their verdict, but are to consider of it, and deliver it in, with the same forms as upon civil causes; only they cannot, in a criminal case which touches life or member, give a **privy verdict.** But the judges may adjourn while the jury are withdrawn to confer, and return to receive the verdict in open court. And such public or open verdict may be either **general**, guilty, or not guilty, **or special**, setting forth all the circumstances of the case, and praying the judgment of the court whether, for instance, on the facts stated, it be murder, manslaughter, or no crime at all.[6] [361] This is where they *doubt* the matter of law, and therefore *choose* to leave it to the determination of the court, though they have an unquestionable right of determining upon all the circumstances, and finding a general verdict, if they think proper so to hazard a breach of their oaths. Yet in many instances **where, contrary to evidence**, the jury have found the prisoner guilty, their verdict hath been mercifully set aside, and a **new trial granted** by the Court of King's Bench. But there hath yet been no instance of granting a new trial where the prisoner was *acquitted* upon the first.[7]

If the jury therefore find the prisoner not guilty he is then forever quit and discharged of the accusation, except he be appealed of felony within the time limited by law. And upon such his acquittal or discharge for want of prosecution he shall be immediately set at large without payment

6. Very rare, but allowable unless prohibited by statute. Clark's Crim. Proced., 488 and cases cited.

7. "By statute in many of the states a writ of error or appeal is allowed the state from an adverse judgment on motion to quash or demurrer, or motion in arrest of judgment or where a statute has been held unconstitutional; and it is also allowed by statute in case of an acquittal by the jury on the facts for the purpose of obtaining and settling questions of law but not for the purpose of obtaining a new trial." Clark's Crim. Proced., 393 and note, where the cases are collected.

of any fee to the gaoler. [362] **But if the jury find him guilty,** he is then said to be *convicted* of the crime whereof he stands indicted, — which conviction may accrue two ways, either by his confessing the offence and pleading guilty, or by his being found so by the verdict of his country.

When the offender is thus convicted there are two collateral circumstances that immediately arise.

(1) On a conviction (or even upon an acquittal where there was a reasonable ground to prosecute, and in fact a *bona fide* prosecution) for any grand or petit larceny or other felony, the reasonable **expenses of prosecution,** and also, if the prosecutor be poor, a compensation for his trouble and loss of time, are by statutes 25 Geo. II. c. 36, and 18 Geo. III. c. 19, to be allowed him out of the county stock if he petitions the judge for that purpose; and by statute 27 Geo. II. c. 3, explained by the same statute, 18 Geo. III. c. 19, all persons appearing upon recognizance or *subpoena* to give evidence, whether any indictment be preferred or no, and as well without conviction as with it, are entitled to be paid their charges, with a further allowance (if poor) for their trouble and loss of time.[8]

(2) On a conviction of larceny in particular, **the prosecutor shall have restitution of his goods,** by virtue of the statute 21 Hen. VIII. c. 11. For by the common law there was no restitution of goods upon an indictment, because it is at the suit of the king only, and therefore the party was enforced to bring an appeal of robbery in order to have his goods again. And it is now usual for the court, upon the conviction of a felon, to order, without any writ, immediate restitution of such goods as are brought into court to be made to the several prosecutors. [363] Or else, *secondly,* without such writ of restitution, the party may peaceably retake his goods wherever he happens to find them, unless a new property be fairly acquired therein. Or, *lastly,* if the felon be convicted and pardoned, or be allowed his clergy, the party robbed may bring his action of trover against him for his goods, and recover a satisfaction in damages. But such action lies not before prosecution, for so felonies

8. With us costs and expenses are entirely a matter of statute.

would be made up and healed; and also recaption is unlawful if it be done with intention to smother or compound the larceny, it then becoming the heinous offence of theft-bote, as was mentioned in a former chapter.

It is not uncommon, when a person is convicted of a misdemeanor which principally and more immediately affects some individual, as a battery, imprisonment, or the like, for the court to permit the defendant to speak with the prosecutor before any judgment is pronounced, and if the prosecutor declares himself satisfied to inflict but a trivial punishment. This is done to reimburse the prosecutor his expense and make him some private amends without the trouble and circuity of a civil action. But it surely is a dangerous practice.[9]

9. The compounding of a felony is in itself a crime; but some (not all) misdemeanors may be compounded or settled. In some states the compounding of any crime is very properly forbidden by statute. See Rev. Stat. Ill. 1874, 358, § 43; Washburn Crim. Law (3d Ed.), 13; McClain's Crim. Law, § 939; Com. v. Pease, 16 Mass. 92.

CHAPTER XXVIII.

OF THE BENEFIT OF CLERGY.[1]

After trial and conviction, the judgment of the court regularly follows, unless suspended or arrested by some intervening circumstance; of which the principal is the **benefit of clergy**:[2] a title of no small curiosity as well as use; and concerning which I shall therefore inquire: 1. Into its original, and the various mutations which this privilege of clergy has sustained. 2. To what persons it is to be allowed at this day. 3. In what cases. 4. The consequences of allowing it.

I. **Clergy, the privilegium clericale, or in common speech, the benefits of clergy, had its original from the pious regard paid by Christian princes to the church in its infant state;** and the ill use which the popish ecclesiastics soon made of that pious regard. The exemptions which they granted to the church, were principally of two kinds: 1. **Exemption of places** consecrated to religious duties, from criminal arrests, which was the foundation of sanctuaries; 2. **Exemption of the persons** of clergymen from criminal process before the secular judge in a few particular cases, which was the true original and meaning of the *privilegium clericale.*

But the clergy increasing in wealth, power, honour, number and interest, began soon to set up for themselves: and that which they obtained by the favour of the civil government, they now claimed as their inherent right: and as a [366] right of the highest nature, indefeasible, and *jure divino.*[2a] By their canons therefore and constitutions they endeavoured at and where they met with easy princes obtained, a vast extension of these exemptions: as well in regard to the crimes themselves, of which the list became quite universal;[3] as in regard to the persons exempted, among whom were at length comprehended not only every little subordinate officer belonging to the church or clergy, but even many that were totally laymen.

In England, however, although the usurpations of the pope were very many and grievous, till Henry the Eighth entirely exterminated his supremacy, yet a total exemption of the clergy from secular jurisdiction could never be thoroughly effected, though often endeavoured by the clergy:[4]

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1. Benefit of clergy no longer exists either in England or this country. On account of its historical interest, however, it is retained in small type.

2. As to this subject in general, see 2 Hale, 323 to 391; index, Clergy; Fost. C. L. index, Clergy; Williams J. Felony, V.; Burn J. Clergy; II.; Com. Dig. Justices, Y.; Bac. Ab. Felony, G.; 1 Chit. C. L. (2d Ed.), 667 to 690.

2a. The principal argument upon which they founded this exemption was that text of Scripture: "Touch not mine annointed, and do my prophets no harm." Keilw. 181.

3. See Book III, page *62.

4. Keilw. 180.

and therefore, though the ancient *privilegium clericale* was in *some* capital cases, yet it was not *universally* allowed. And in those particular cases, the use was for the bishop or ordinary to demand his clerks to be remitted out of the king's courts, as soon as they were indicted: concerning the allowance of which demand there was for many years a great uncertainty; [5] till at length it was finally settled in the reign of Henry the Sixth, that the prisoner should first be arraigned; and might either *then* claim his benefit of clergy, by way of declinatory plea; or, *after conviction*, by way of arresting judgment. This latter way is most usually practised, as it is more to the satisfaction of the court to have the crime previously ascertained by confession or the verdict of a jury: and also it is more advantageous to the prisoner himself, who may possibly be acquitted, and so need not the benefit of his clergy at all.

Originally the law was held, that no man should be admitted to the privilege of clergy, but such as had the [367] *habitum et tonsuram clericalem*.[6] But in process of time a much wider and more comprehensive criterion was established: every one that could read (a mark of great learning in those days of ignorance and her sister superstition) being accounted a clerk or *clericus*, and allowed the benefit of clerkship, though neither initiated in holy orders, nor trimmed with the clerical tonsure. But when learning, by means of the invention of printing, and other concurrent causes, began to be more generally disseminated than formerly; and reading was no longer a competent proof of clerkship, or being in holy orders; it was found that as many laymen as divines were admitted to the *privilegium clericale:* and therefore by statute 4 Hen. VII. c. 13, a distinction was once more drawn between mere lay scholars, and clerks that were really in orders. And, though it was thought reasonable still to mitigate the severity of the law with regard to the former, yet they were not put upon the same footing with actual clergy; being subjected to a slight degree of punishment, and not allowed to claim the clerical privilege more than once. Accordingly the statute directs that no person once admitted to the benefit of clergy, shall be admitted thereto a second time, unless he produces his orders: and in order to distinguish their persons, all laymen who are allowed this privilege shall be burnt with a hot iron in the brawn of the left thumb. This distinction between learned laymen, and real clerks in orders, was abolished for a time by the statutes 28 Hen. VIII. c. 1, and 32 Hen. VIII. c. 3, but it is held [7] to have been virtually restored by statute 1 Edw. VI. c. 12, which statute also enacts, that lords of parliament and peers of the realm, having place and voice in parliament, may have the benefit of their peerage, equivalent to that of clergy, for the first offence (although they cannot read, and without being burnt in the hand), for all offences then clergy-

5. 2 Hal. P. C. 377.

6. 2 Hal. P. C. 372, M. Paris, A. D. 1259. See Book I, p. 24.

7. Hob. 294; 2 Hal. P. C. 375.

able to commoners, and also for the crimes of house-breaking, highway-robbery, horse-stealing, and robbing of churches.[8]

[368] After this burning the laity, and before it the real clergy, were discharged from the sentence of the law in the king's court, and delivered over to the ordinary, to be dealt with according to the ecclesiastical canons. Whereupon the ordinary, not satisfied with the proofs adduced in the profane secular court, set himself formerly to work to make a purgation of the offender by a new canonical trial; although he had been previouesly convicted by his country, or perhaps by his own confession.[9] This trial was held before the bishop in person, or his deputy; and by a jury of twelve clerks: and there, first, the party himself was required to make oath of his own innocence; next, there was to be the oath of twelve compurgators, who swore they believed he spoke the truth; then, witnesses were to be examined upon oath, but on behalf of the prisoner only: and lastly, the jury were to bring in their verdict upon oath, which usually acquitted the prisoner; otherwise, if a clerk, he was degraded, or put to penance.[1] A learned judge, in the beginning of the last century,[2] remarks with much indignation the vast complication of perjury and subornation of perjury, in this solemn farce of a mock trial; the witnesses, the compurgators, and the jury, being all of them partakers in the guilt. the delinquent party also, though convicted before on the clearest evidence, and conscious of his own offence, yet was permitted and almost compelled to swear himself not guilty: nor was the good bishop himself, under whose countenance this scene of wickedness was daily transacted, by any means exempt from a share of it. And yet by this purgation the party was restored to his credit, his liberty, his lands, and his capacity for purchasing afresh, and was entirely made a new and an innocent man.

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8. Upon the conviction of the duchess of Kingston for bigamy, it was argued by the attorney-general Thurlow, that peeresses were not entitled by 1 Edw. VI., c. 12, like peers to the privilege of peerage; but it was the unanimous opinion of the judges, that a peeress convicted of a clergyable felony ought to be immediately discharged without being burnt in the hand, or without being liable to any imprisonment. 11 H. St. Tr. 264. If the duchess had been admitted, like a commoner, only to the benefit of clergy, burning in the hand at that time could not have been dispensed with. The argument was, that the privilege of peerage was only an extension of the benefit of clergy, and therefore granted only to those who were or might be entitled to that benefit; but as no female, peeress or commoner, at that time was entitled to the benefit of clergy, so it was not the intention of the legislature to grant to any female the privilege of peerage. And in my opinion the argument of the attorney-general is much more convincing and satisfactory, as a legal demonstration, than the arguments of the counsel on the other side, or the reasons stated for the opinions of the judges.

9. Staundford, P. C. 138 b.

1. 3 P. Wms. 447; Hub. 289.

2. Hob. 291.

This scandalous prostitution of oaths, and the forms of justice, in the almost constant acquittal of felonious clerks by purgation, was the occasion, that, upon very heinous and [369] notorious circumstances of guilt, the temporal courts would not trust the ordinary with the trial of the offender, but delivered over to him the convicted clerk, *absque purgatione facienda;*[3] in which situation the clerk convict could not make purgation; but was to continue in prison during life, and was incapable of acquiring any personal property, or receiving the profits of his lands, unless the king should please to pardon him. Both these courses were in some degree exceptionable; the latter being perhaps too rigid, as the former was productive of the most abandoned perjury. As therefore these mock trials took their rise from factious and popish tenets, tending to exempt one part of the nation from the general municipal law, it became high time, when the reformation was thoroughly established, to abolish so vain and impious a ceremony.

Accordingly the statute of 18 Eliz. c. 7, enacts, that, for the avoiding of such perjuries and abuses, after the offender has been allowed his clergy, he shall not be delivered to the ordinary, as formerly; but, upon such allowance and burning in the hand, he shall forthwith be enlarged and delivered out of prison; with proviso, that the judge may, if he thinks fit, continue the offender in gaol for any time not exceeding a year. And thus the law continued, for above a century, unaltered, except only that the statute of 21 Jac. I. c. 6, allowed, that women convicted of simple larcenies under the value of ten shillings should (not properly have the benefit of clergy, for they were not called upon to read; but) be burned in the hand, and whipped,[4] stocked, or imprisoned for any time not exceeding a year. And a similar indulgence, by the statutes 3 & 4 W. & M. c. 9, and 4 & 5 W. & M. c. 24, was extended to women, guilty of any clergyable felony whatsoever; who were allowed once to claim the benefit of the *statute*, in like manner as men might claim the benefit of *clergy*, and to be discharged upon being burnt in the hand, and imprisoned for any time not exceeding a year. The punishment of burning in the *hand*, being found ineffectual, was also changed by statute 10 & 11 W. III. c. 23, into burning in the most visible part of the left *cheek*, nearest the nose: but such an indelible stigma being found by experience to render offenders desperate, this provision was repealed, about seven years afterwards, by statute 5 Ann. c. 6, and till that period, all women, all peers of parliament and peeresses, and all male commoners who could read, were discharged [370] in all clergyable felonies; the males absolutely, if clerks in orders; and other commoners, both male and female, upon branding; and peers and peeresses without branding, for the first offence: yet all liable (excepting peers and peeresses), if the judge saw occasion, to imprisonment not exceeding a year. And

3. Without making purgation.

4. Whipping of women is abolished by 1 Geo. IV., c. 57.

those men who could not read, if under the degree of peerage, were hanged.

Afterwards indeed it was considered, that education and learning were no extenuations of gilt, but quite the reverse, and that, if the punishment of death for simple felony was too severe for those who had been liberally instructed, it was, *a fortiori*, too severe for the ignorant also. And thereupon by the same statute 5 Ann. c. 6, it was enacted, that the benefit of clergy should be granted to all those who were entitled to ask it, without requiring them to read by way of conditional merit.[5] And experience having shown that so very universal a lenity was frequently inconvenient, and an encouragement to commit the lower degrees of felony; and that, though capital punishments were too rigorous for these inferior offences, yet no punishment at all (or next to none) was as much too gentle; it was further enacted by the same statute, that when any person is convicted of any theft, or larceny, and burnt in the hand for the same according to the ancient law, he shall also, at the discretion of the judge, be committed to the house of correction or public workhouse, to be there kept to hard labour, for any time not less than six months and not exceeding two years; with a power of inflicting a double confinement in case of the party's escape from the first. And it was also enacted by the statutes 4 Geo. I. c. 11, and 6 Geo. I. c. 23, that when any persons shall be convicted of any larceny, either grand or petit, or any felonious stealing or taking of money or goods and chattels either from the person or the house of any other, or in any other manner, and who by the law shall be entitled to the benefit of clergy, and liable only to the penalties of burning in the hand or whipping, the court in their discretion, instead of such burning in the hand or whipping, may direct such offenders to be transported to America (or, by the statute 19 Geo. III. c. 74, to any other parts beyond the seas) for seven years: and, if they [371] return or are seen at large in this kingdom within that time, it shall be felony without benefit of clergy. And by the subsequent statutes 16 Geo. II. c. 15, and 8 Geo. III. c. 15, many wise provisions are made for the more speedy and effectual execution of the laws relating to transportation, and the conviction of such as transgress

5. The statute enacts, that if a person convicted of a clergyable offence *shall pray the benefit of this act*, he shall not be required to read, but shall be taken to be, and punished as, a clerk convict. Hence persons convicted of manslaughters, bigamies, and simple grand larcenies, etc., are still asked what they have to say why judgment of death should not be pronounced upon them? And they are then told to kneel down, and pray the benefit of the statute. It would perhaps have been more consistent with the dignity of a court of justice to have granted the benefit of clergy without requiring an unnecessary form, the meaning of which very few comprehend. And if the prisoner should obstinately refuse to pray the benefit of the statute, it seems to be an unavoidable consequence that the judge must pronounce sentence of death upon him.

them. But now, by the statute 19 Geo. III. c. 74, all offenders liable to transportation may, in lieu thereof, at the discretion of the judges, be employed, if males except in the case of petty larceny, in hard labour for the benefit of some public navigation; or, whether males or females, may, in all cases, be confined to hard labour in certain penitentiary houses, to be erected by virtue of the said act, for the several terms therein specified, but in no case exceeding seven years; with a power of subsequent mitigation, and even of reward, in case of their good behaviour. But if they escape and are re-taken, for the first time an addition of three years is made to the term of their confinement; and a second escape is felony without benefit of clergy.

In forming the plan of these penitentiary houses, the principal objects have been, by sobriety, cleanliness, and medical assistance, by a regular series of labour, by solitary confinement during the intervals of work, and by due religious instruction, to preserve and amend the health of the unhappy offenders, to inure them to habits of industry, to guard them from pernicious company, to accustom them to serious reflection, and to teach them both the principles and practice of every christian and moral duty. And if the whole of this plan be properly executed, and its defects be timely supplied, there is reason to hope that such a reformation may be effected in the lower classes of mankind, and such a gradual scale of punishment be affixed to all gradations of guilt, as may in time supersede the necessity of capital punishment, except for very atrocious crimes.

It is also enacted by the same statute, 19 Geo. III. c. 74, that instead of burning in the hand (which was sometimes too slight and sometimes too disgraceful a punishment) the court in all clergyable felonies may impose a pecuniary fine; or (except in the case of manslaughter) may order the offender to be once or oftener, but not more than thrice, either publicly or privately whipped; such private whipping (to prevent collusion or abuse) to be inflicted in the presence of two witnesses, and in case of female offenders in the presence of females only. Which fine or whipping shall have the same consequences as burning in the hand; and the offender, so fined or whipped, shall be equally liable to a subsequent detainer or imprisonment.

In this state does the benefit of clergy at present stand; very considerably different from its original institution: the wisdom of the English legislature having, in the course of a long and laborious process, extracted by a noble alchemy rich medicines out of poisonous ingredients; and converted, by gradual mutations, what was at first an unreasonable exemption of particular popish ecclesiastics, into a merciful mitigation of the general law, with respect to capital punishment.

From the whole of this detail we may collect, that however in times of ignorance and superstition that monster in true policy may for a while subsist, of a body of men, residing in the bowels of a state, and

yet independent of its laws; yet, when learning and rational religion have a little enlightened men's minds, society can no longer endure an absurdity so gross, as must destroy its very fundamentals. For, by the original contract of government, the price of protection by the united force of individuals is that of obedience to the united will of the community. This united will is declared in the laws of the land: and that united force is exerted in their due, and universal, execution.

II. I am next to inquire, **to what persons the benefit of clergy is to be allowed** at this day: and this must be chiefly collected from what has been observed in the preceding [372] article. For, upon the whole, we may pronounce, that all clerks in orders are, without any branding, and of course without any transportation, fine, or whipping for those are only substituted in lieu of the other), to be admitted to this privilege, and immediately discharged; and this as often as they offend.[7] Again, all lords of parliament and peers of the realm having place and voice in parliament, by the statute 1 Edw. VI. c. 12 (which is likewise held to extend to peeresses),[8] shall be discharged in all clergyable and other felonies provided for by the act, without any burning in the hand or imprisonment, or other punishment susbtituted in its stead, in the same manner as real clerks convict: but this is only for the first offence. Lastly, all the commons of the realm, not in orders, whether male or female, shall for the first offence be discharged of the capital punishment of felonies within the benefit of clergy, upon being burnt in the hand, whipped, or fined, or suffering a discretionary imprisonment in the common gaol, the house of correction, one of the penitentiary houses, or in the places of labour for the benefit of some navigation; or, in case of larceny, upon being transported for seven years, if the court shall think proper. It hath been said, that Jews, and other infidels and heretics, were not capable of the benefit of clergy, till after the statute 5 Ann. c. 6, as being under a legal incapacity for orders.[9] But I much question whether this was ever ruled for law, since the re-introduction of the Jews into England, in the time of Oliver Cromwell. For, if that were the case, the Jews are still in the same predicament, which every day's experience will contradict: the statute of queen Anne having certainly made no alteration in this respect; it only dispensing with the necessity of reading in those persons, who, in case they could read, were before the act entitled to the benefit of their clergy.

III. The third point to be considered is, for what *crimes* the *privilegium clericale*, or benefit of clergy, is to be allowed. And, it is to be observed, that neither in high treason nor in petit larceny, nor in any mere misdemeanors, it was indulged at the common law; and therefore we may lay it down for a rule that it was allowable only in petit treason and capital felonies: which for the most part became legally entitled to this

7. 2 Hal. P. C. 375.

8. Duchess of Kingston's case in Parliament, 22 Apr. 1776.

9. 2 Hal. P. C. 373; 2 Hawk. P. C. 338; Fost. 306.

[373] indulgence by the statute *de clero*, 25 Edw. III. st. 3, c. 4, which provides that clerks convict for treasons or felonies, touching other persons than the king himself or his royal majesty, shall have the privilege of holy church. But yet it was not allowable in all felonies whatsoever: for in some it was denied even by the common law, viz., *insidiatio viarum*, or lying in wait for one on the highway; *depopulatio agrorum*, or destroying and ravaging a country; [1] and *combustio domorum*, or arson, that is, the burning of houses: [2] all which are a kind of hostile acts, and in some degree border upon treason. And farther, all these identical crimes, together with petit treason, and very many other acts of felony, are ousted of clergy by particular acts of parliament; which have in general been mentioned under the particular offences to which they belong, and therefore need not be here recapitulated. Upon all which statutes for excluding clergy I shall only observe, that they are nothing else but the restoring of the law, to the same rigor of capital punishment in the first offence, that is exerted before the *privilegium clericale*, was at all indulged; and which it still exerts upon a second offence in almost all kinds of felonies, unless committed by clerks actually in orders. But so tender is the law of inflicting capital punishment in the first instance for any inferior felony, that notwithstanding by the marine law, as declared in statute 28 Hen. VIII. c. 15, the benefit of clergy is not allowed in any case whatsoever; yet, when offences are committed within the admiralty-jurisdiction, which would be clergyable if committed by land, the constant course is to acquit and discharge the prisoner.[3] And, to conclude this head of inquiry, we may observe the following rules: 1. That in all felonies, whether new created or by common law, clergy is now allowable, unless taken away by express words of an act of parliament.[4] 2. That, where clergy is taken away from the principal, it is not of course taken away from the accessary, unless he be also particularly included in the words of the statute.[5] 3. That when the benefit of clergy is taken away from the *offence* (as in case of murder, buggery, robbery, rape, and burglary), a principal in the second degree being present, aiding and abetting the crime, is as well [374] excluded from his clergy as he that is principal in the first degree: but, 4. That, where it is only taken away from the *person committing* the offence (as in the case of stabbing, or committing larceny in a dwelling-house, or privately from the person), his aider and abettors are not excluded; though the tenderness of the law, which hath determined that such statutes shall be taken literally.[6]

IV. Lastly, we are to inquire what the consequences are to the party,

1. 2 Hal. P. C. 333.

2. 1 Hal. P. C. 346.

3. Moor, 756; Fost. 288. But now, by 39 Geo. III., c. 37, offences committed on the high seas are to be considered and treated in the same manner as if committed on shore; and see the 43 Geo. III., c. 113, s. 6, 56 Geo. III., c. 27, s. 3.

4. 2 Hal. P. C. 330.

5. 2 Hawk. P. C. 342.

6. 1 Hal. P. C. 529; Fost. 356, 357.

of allowing him this benefit of clergy. I speak not of the branding, fine, whipping, imprisonment, or transportation; which are rather concomitant conditions, than consequences of receiving this indulgence. The consequences are such as affect his present interest, and future credit and capacity: as having been once a felon, but now purged from that guilt by the privilege of clergy; which operates as a kind of statute pardon.

And, we may observe, 1. That by this conviction he forfeits all his goods to the king; which being once vested in the crown, shall not afterwards be restored to the offender.[7] 2. That, after conviction, and till he receives the judgment of the law, by branding, or some of its substitutes, or else is pardoned by the king, he is to all intents and purposes a felon, and subject to all the disabilities and other incidents of a felon.[8] 3. That after burning, or its substitute, or pardon, he is discharged for ever of that, and all other felonies before committed, within the benefit of clergy; but not of felonies from which such benefit is excluded: and this by statutes 8 Eliz. c. 4, and 18 Eliz. c. 7. 4. That by burning, or its substitute, or the pardon of it, he is restored to all capacities and credits, and the possession of his lands, as if he had never been convicted.[9] 5. That what is said with regard to the advantages of commoners and laymen, subsequent to the burning in the hand, is equally applicable to all peers and clergymen, although never branded at all, or subjected to other punishment in its stead. For they have the same privileges, without any burning, or any substitute for it, which others are entitled to after it.[1]

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7. 2 Hal. P. C. 388.
8. 3 P. Wms. 487.
9. 2 Hal. P. C. 389; 5 Rep. 110.
1. 2 Hal. P. C. 389, 390.

The various statutes mentioned in the course of this chapter, as relating to benefit of clergy, have been either expressly repealed, or rendered inoperative, by the passing of the recent statute, 7 and 8 Geo. IV., c. 28; § 6 of which enacts, that benefit of clergy, with respect to persons convicted of felony, shall be abolished; but that nothing therein contained shall prevent the joinder in any indictment of any counts which might have been joined before the passing of the Act.

Section 7 of the same statute enacts, that no person convicted of felony shall suffer death, unless it be for some felony which was excluded from the benefit of clergy before, or on the first day of the (then) present session of parliament, or which has been or shall be made punishable with death by some statute passed after that day.

The 6 Geo. IV., c. 25, entitled, "An Act for defining the rights of capital convicts who receive pardon, and of convicts after having been punished for clergyable felonies; for placing clerks in orders on the same footing with other persons as to felonies; and for limiting the effect of the benefit of clergy;" had previously enacted, by section 1, that in case of free pardons, the prisoner's discharge, and in case of conditional pardons, the performance of the condition, should have the effect of a pardon under the great seal; by section 2, that offenders convicted of clergyable felonies enduring the punishment ad-

CHAPTER XXIX.

OF JUDGMENT AND ITS CONSEQUENCES.

When upon a capital charge the jury have brought in their verdict guilty, in the presence of the prisoner, he is either immediately or at a convenient time soon after asked by the court if he has **anything to offer why judgment should not be awarded against him.**[1] [375] And in case the defendant be found guilty of a misdemeanor (the trial of which may, and does usually, happen in his absence, after he has once appeared), a *capias* is awarded and issued to bring him in to receive his judgment, and if he absconds he may be prosecuted even to outlawry. But whenever he appears in person, upon either a capital or inferior conviction, he may at this period as well as at his arraignment offer any **exceptions to the indictment in arrest or stay of judgment,**[2] as for want of sufficient certainty in setting forth either the person, the time, the place, or the offence. And if the objections be valid, the whole proceedings shall be set aside; but the party may be indicted again. And we may take notice, 1. That **none of the statutes of jeofails, for amendment of errors, extend to indictments**[3] or pro-

judged, such punishment should have the effect of burning in the hand; by section 3, that clerks should be liable to punishment, as if not in orders; and by section 4, that the allowance of the benefit of clergy to any person who should, after the passing of that Act, be convicted of any felony, should not render the person to whom such benefit was allowed, dispunishable for any other felony, by him or her committed before the time of such allowance, any law, custom, or usage, to the contrary, notwithstanding.

1. As a rule if this formality is omitted, the judgment will be set aside. Clark's Crim. Proced., 494; Ball v. U. S., 140 U. S. 118; Mesoner v. People, 45 N. Y. 1. There are cases *contra,* where defendant was represented by counsel. Clark's Crim. Proced. 494 and cases cited in note.

2. The method of reviewing criminal trials varies in different jurisdictions. Generally, a motion for a new trial and in arrest of judgment is made and if overruled a bill of exceptions is settled and the case reviewed on a writ of error or appeal. Consult the local statutes and works on Criminal Law.

3. At common law an information could be amended by leave of court; but an indictment being a finding by

ceedings in criminal cases, and therefore a defective indictment is not aided by a verdict, as defective pleadings in civil cases are. [376] 2. That in favor of life great strictness has at all times been observed in every point of an indictment.

A pardon also may be pleaded in arrest of judgment, and it has the same advantage when pleaded here as when pleaded upon arraignment: viz., the saving the attainder, and of course the corruption of blood,[4] which nothing can restore but parliament when a pardon is not pleaded till after sentence.

Praying the benefit of clergy may also be ranked among the motions in arrest of judgment.

If all these resources fail, the court must pronounce that judgment which the law hath annexed to the crime.

When sentence of death is pronounced, the immediate inseparable consequence from the common law is attainder.[5] [380]

He is then called attaint, *attinctus*, stained or blackened. He is no longer of any credit or reputation; he cannot be a witness in any court, neither is he capable of performing the functions of another man; for, by anticipation of his punishment, he is already dead in law. This is after *judgment*, for there is great difference between a man *convicted* and *attainted*. After conviction only, a man is liable to none of these disabilities, for there is still in contemplation of law a possibility of his innocence. [381] Something may be offered in arrest of judgment; the indictment may be erroneous, which will render his guilt uncertain, and thereupon the present conviction may be quashed; he may obtain a pardon, or be allowed the benefit of clergy. Upon judgment of death, and not before, the attainder of a criminal commences; or upon such circumstances as are equivalent to judgment of death, as judgment of outlawry on a capital crime, pronounced for absconding or fleeing from justice, which tacitly confesses the guilt. And therefore either upon

a grand jury an oath could not be so amended at least not in matter of substance. Clark's Crim. Proced., 315; Patrick v. People, 132 Ill. 529; *Ex parte* Bain, 121 U. S. 1.

4. Attainder and corruption of blood have been abolished in England and never existed in the United States.

judgment of outlawry or of death, for treason or felony, a man shall be said to be attainted.

The consequences of attainder are forfeiture and corruption of blood. [Not applicable to this country.]

I. Forfeiture is twofold, of real and personal estates. First, **as to real estates:** by attainder **in high treason** a man forfeits to the king all his lands and tenements of inheritance, whether fee-simple or fee-tail, and all his rights of entry on lands or tenements which he had at the time of the offence committed, or at any time afterwards, to be forever vested in the crown; and also the profits of all lands and tenements which he had in his own right for life or years, so long as such interest shall subsist. This forfeiture relates backwards to the time of the treason committed, so as to avoid all intermediate sales and incumbrances, but not those before the fact.

In petit treason and felony the offender also forfeits all his chattel interests absolutely, and the profits of all estates of freehold during life, and after his death all his lands and tenements in fee simple (but not those in tail) to the crown, for a very short period of time; for the king shall have them for a year and a day, and may commit therein what waste he pleases, which is called the king's *year, day,* and *waste.* [385] This year, day, and waste are now usually compounded for; but otherwise they regularly belong to the crown, and after their expiration the land would have naturally descended to the heir (as in gavelkind tenure it still does), did not its feodal quality intercept such descent and give it by way of **escheat to the lord.** [386] These forfeitures for felony do also arise only upon attainder, and therefore a *felo de se* forfeits no land of inheritance or freehold, for he never is attainted as a felon. They likewise relate back to the time of the offence committed as well as forfeitures for treason, so as to avoid all intermediate charges and conveyances.

The forefeiture of goods and chattels accrues in every one of the higher kinds of offence; in high treason or misprision thereof, petit treason, felonies of all sorts, whether clergyable or not, self-murder or felony *de se,* petit larceny, standing mute, and the offences of striking, etc., in Westminster Hall. [387] For *flight* also, on an accusation of treason, felony, or even petit larceny, whether the party be found guilty or acquitted, if the jury find the flight the party shall forfeit his goods and chattels.

There is a remarkable **difference or two between the forfeiture of lands and of goods and chattels.** 1. Lands are forfeited upon *attainder,* and not before; goods and chattels are forfeited by *conviction.* 2. In outlawries for treason or felony, lands are forfeited only by the judgment; but the goods and chattels are forfeited by a man's being first put in the *exigent,* without staying till he is *quinto exactus,* or finally outlawed, for the secreting himself so long from justice is construed a flight in law. The forfeiture of lands has relation to the time of the fact committed, so as to avoid all subsequent sales and incumbrances; but the forfeiture

of goods and chattels has no relation backwards, so that those only which a man has at the time of conviction shall be forfeited.

II. **Another immediate consequence of attainder is the corruption of blood,** both upwards and downwards; so that an attainted person can neither inherit lands or other hereditaments from his ancestors, nor retain those he is already in possession of, nor transmit them by descent to any heir, but the same shall escheat to the lord of the fee, subject to the king's superior right of forfeiture. And the person attainted shall also obstruct all descents to his posterity, wherever they are obliged to derive a title through him to a remoter ancestor. [388]

CHAPTER XXX.

OF REVERSAL OF JUDGMENT.

Judgments, with their several connected consequences of attainder, forfeiture, and corruption of blood, may be set aside, either by falsifying or reversing the judgment, or else by reprieve or pardon. [390]

A judgment may be falsified, reversed, or avoided, in the first place, without a writ of error, for matters foreign to or dehors the record, that is, not apparent upon the face of it, so that they cannot be assigned for error in the superior court, which can only judge from what appears in the record itself, and, therefore, if the whole record be not certified, or not truly certified by the inferior court, the party injured thereby (in both civil and criminal cases) may **allege a diminution of the record**, and cause it to be rectified.[1] **Thus, if any judgment whatever be given by persons who had no good commission** to proceed against the person condemned, it is void, and may be falsified, by showing the special matter, without writ of error.[2]

So likewise if a man purchases land of another, and afterwards the vendor is, either by outlawry or his own confession, convicted and attainted of treason or felony previous to the sale or alienation, whereby such land becomes liable to forfeiture or escheat, now upon any trial the purchaser is at liberty, without bringing any writ of error, to falsify not only the time of the felony or treason supposed, but the very point of the felony or treason itself, and is not concluded by the confession or the outlawry of the vendor, though the vendor himself is concluded, and not suffered now to deny the fact which he has by confession or flight acknowledged. [391] But if such attainder of the vendor was by verdict on the oath of his peers, the alienee cannot be received to falsify or contradict the *fact* of the crime committed, though he is at liberty to prove a mistake in *time*, or that the offence was committed after the alienation, and not before.

1. Not an uncommon proceeding in this country.

2. A judgment or decree that is void may be attacked collaterally; one that is merely voidable or erroneous must by some direct proceeding such as a writ of error be reversed on appeal and is binding till so reversed.

Secondly, **a judgment may be reversed by writ of error,**[3] which lies from all inferior criminal jurisdictions to the Court of King's Bench, and from the King's Bench to the House of Peers, and may be brought for notorious mistakes in the judgment or other parts of the record, as where a man is found guilty of perjury and receives the judgment of felony, or for other less palpable errors.

These writs of error, to reverse judgment in case of misdemeanors, are not to be allowed of course, but on sufficient probable cause shown to the Attorney-General, and then they are understood to be grantable of common right and *ex debito justitiae*. [392] But writs of error to reverse attainders in capital cases are only allowed *ex gratia*, and not without express warrant under the king's sign manual, or at least by the consent of the Attorney-General. These, therefore, can rarely be brought by the party himself, especially where he is attainted for an offence against the state; but they may be brought by his heir or executor, after his death, in more favorable times, which may be some consolation to his family. But the easier and more effectual way is,

Lastly, **to reverse the attainder by act of parliament.**

The effect of falsifying or reversing an outlawry is that the party shall be in the same plight as if he had appeared upon the *capias*, and if it be before plea pleaded, he shall be put to plea to the indictment, if after conviction, he shall receive the sentence of the law; for all the other proceedings, except only the process of outlawry or his non-appearance, remain good and effectual as before.

But when judgment, pronounced upon conviction, is falsified or reversed,[4] all former proceedings are absolutely set aside, and the party stands as if he had never been at all accused, restored in his credit, his capacity, his blood, and his estates; with regard to which last, though they may be granted away by the crown, yet the owner may enter upon the grantee with as little ceremony as he might enter upon a disseisor. [393] But he still remains liable to another prosecution for the same offence, for, the first being erroneous, he never was in jeopardy thereby.

3. See preceding note.

4. When a judgment is reversed for error, the usual practice is to remand the case to the court below for a new trial; although at times the judgment is simply reversed.

CHAPTER XXXI.

OF REPRIEVE AND PARDON.

The only other remaining ways of avoiding the execution of the judgment are by a reprieve or a pardon, whereof the former is temporary only, the latter permanent. [394]

I. **A reprive,** from *reprendre,* to take back, is the withdrawing of a sentence for an interval of time, whereby the execution is suspended. This may be, first, **ex arbitrio judicis,**[1] either before or after judgment: as where the judge is not satisfied with the verdict, or the evidence is suspicious, or the indictment is insufficient, or he is doubtful whether the offence be within clergy; or sometimes, if it be a small felony, or any favorable circumstances appear in the criminal's character, in order to give room to apply to the crown for either an absolute or conditional pardon.

Reprieves may be **ex necessitate legis,**[2] as where a woman is capitally convicted and pleads her pregnancy: though this is no cause to stay the judgment, yet it is to respite the execution till she be delivered.

Another cause of regular reprieve is, if the offender becomes non compos between the judgment and the award of execution. For regularly, though a man be *compos* when he commits a capital crime, yet if he becomes *non compos* after, he shall not be indicted; if after indictment, he shall not be convicted; if after conviction, he shall not receive judgment; if after judgment, he shall not be ordered for execution; for "*furiosus solo furore punitur,*"[3] and the law knows not but he might have offered some reason, if in his senses, to have stayed these respective proceedings. [396] It is therefore an invariable rule, when any time intervenes between the attainder and the award of execution, to demand of the prisoner what he hath to allege why execution should not be awarded against him; and if he appears to be insane, the judge in his discretion may and ought to reprieve him. **Or the party may**

1. At the will of the judge.
2. From necessity of law.
3. A madman is punished by his madness alone.

plead in bar of execution, which plea may be either **pregnancy**, the king's **pardon**, an **act of grace**, or **diversity of person**, viz., that he is not the same as was attainted, and the like. In this last case a jury shall be impanelled to try this collateral issue, namely, the identity of his person; and not whether guilty or innocent, for that has been decided before. And in these collateral issues the trial shall be *instanter*, and no time allowed the prisoner to make his defence or produce his witnesses, unless he will make oath that he is not the person attainted; neither shall any peremptory challenges of the jury be allowed the prisoner, though formerly such challenges were held to be allowable whenever a man's life was in question.

II. If neither pregnancy, insanity, non-identity, nor other plea will avail to avoid the judgment and stay the execution consequent thereupon, the last and surest resort is in **the king's most gracious pardon.**[4]

1. And first, **the king may pardon all offences merely against the crown** or the public; excepting, 1. That, to preserve the liberty of the subject, the committing any man to prison out of the realm is by the *habeas corpus* act, 31 Car. II. c. 2, made a *praemunire*, unpardonable even by the king. Nor, 2. Can the king pardon where private justice is principally concerned in the prosecution of offenders. [398] Therefore he cannot pardon a common nuisance while it remains unredressed, or so as to prevent an abatement of it, though afterwards he may remit the fine; because, though the prosecution is vested in the king to avoid multiplicity of suits, yet (during its continuance) this offence savors more of the nature of a private injury to each individual in the neighborhood than of a *public* wrong. [399] Neither, lastly, can the king pardon an offence against a popular or penal statute, after information brought, for thereby the informer hath acquired a private property in his part of the penalty.

4. In Massachusetts, Illinois and some other states the executive may only pardon after conviction; but in the United States jurisdiction and others of the several states it is competent for the executive to pardon before trial. Wash. Crim. Law (3d Ed.), 204. See *ante*, note.

There is also a restriction of a peculiar nature that affects the prerogative of pardoning, **in case of parliamentary impeachments**, viz., that the king's pardon cannot be *pleaded* to any such impeachment, so as to impede the inquiry and stop the prosecution of great and notorious offenders.[5] But after the impeachment has been solemnly heard and determined, it is not understood that the king's royal grace is further restrained or abridged. [400]

2. **As to the manner of pardoning.**[6] (1) First, it must be under the *Great* Seal. A warrant under the privy seal or sign manual, though it may be a sufficient authority to admit the party to bail, in order to plead the king's pardon when obtained in proper form, yet is not of itself a complete irrevocable pardon. (2) Next, it is a general rule that, wherever it may reasonably be presumed the king is deceived, the pardon is void. Therefore any suppression of truth or suggestion of falsehood in a charter of pardon will vitiate the whole, for the king was misinformed. (3) General words have also a very imperfect effect in pardons. A pardon of all felonies will not pardon a conviction or attainder of felony (for it is presumed the king knew not of those proceedings), but the conviction or attainder must be particularly mentioned; and a pardon of felonies will not include piracy, for that is no felony punishable at the common law. (4) It is also enacted by statute 13 Ric. II. st. 2, c. 1, that no pardon for treason, murder, or rape shall be allowed unless the offence be particularly specified therein, and particularly in murder it shall be expressed whether it was committed by lying in wait, assault, or *malice prepense*. Under these and a few other restrictions it is a general rule that a pardon shall be taken most beneficially *for* the subject, and most strongly against the king. [401]

A pardon may also be conditional,[7] that is, the king may

5. See U. S. Const., art. 2, sec. 2.

6. In some of the states there are statutes regulating the manner of making application for a pardon. Consult the statutes.

7. Wash. Crim. Law (3d Ed.), 204. A pardon must be specially pleaded unless it is granted by a public statute of which the court must take judicial notice. Clark's Crim. Proced., 407 and cases cited.

extend his mercy upon what terms he pleases, and may annex to his bounty a condition either precedent or subsequent, on the performance whereof the validity of the pardon will depend; and this by the common law.

3. **With regard to the manner of allowing pardons,** we may observe that a pardon by act of parliament is more beneficial than by the king's charter, for a man is not bound to plead it, but the court must *ex-officio* take notice of it; neither can he lose the benefit of it by his own *laches* or negligence, as he may of the king's charter of pardon. [402] The king's charter of pardon must be specially pleaded, and that at a proper time; for if a man is indicted and has a pardon in his pocket, and afterwards puts himself upon his trial by pleading the general issue, he has waived the benefit of such pardon. But if a man avails himself thereof as soon as by course of law he may, a pardon may either be pleaded upon arraignment, or in arrest of judgment, or in the present stage of proceedings, in bar of execution.

4. *Lastly,* **the effect of such pardon by the king** is to make the offender a new man, to acquit him of all corporal penalties and forfeitures annexed to that offence for which he obtains his pardon, and not so much to restore his former as to give him a new credit and capacity.[8] But nothing can restore or purify the blood when once corrupted, if the pardon be not allowed till after attainder, but the high and transcendent power of parliament. Yet if a person attainted receives the king's pardon, and afterwards hath a son, that son may be heir to his father [provided he has no living elder brother born before the attainder], because the father, being made a new man, might transmit new inheritable blood, though, had he been born before the pardon, he could never have inherited at all.

8. Wash. Crim. Law (3d Ed.), 204.

CHAPTER XXXII.

OF EXECUTION.

There now remains nothing to speak of but **execution,** — the completion of human punishment. And this in all cases, as well capital as otherwise, **must be performed by the legal officer,** the sheriff or his deputy, whose warrant for so doing was anciently by precept under the hand and seal of the judge; as it is still practised in the Court of the Lord High Steward upon the execution of a peer, though in the court of the peers in parliament it is done by writ from the king. [403] Afterwards it was established that, in case of life, the judge may command execution to be done without any writ. **And now the usage is** for the judge to sign the calendar, or list of all the prisoners' names, with their separate judgments in the margin, which is left with the sheriff. As, for a capital felony, it is written opposite to the prisoner's name, "Let him be hanged by the neck;" formerly, in the days of Latin and abbreviation, "*sus. per col.*" for "*suspendatur per collum.*"[1] And this is the only warrant that the sheriff has for so material an act as taking away the life of another.[2]

The sheriff cannot alter the manner of the execution by substituting one death for another, without being guilty of felony himself. [404] It is held also by Sir Edward Coke and Sir Matthew Hale that even the king cannot change the punishment of the law by altering the hanging or burning into beheading, though when beheading is part of the sentence, the king may remit the rest. [405] And notwithstanding some examples to the contrary, Sir Edward Coke stoutly maintains that "*judicandum est legibus, non exemplis.*"[3] But others have thought, and more justly, that

1. Let him be suspended by the neck.

2. With us there is a formal death warrant.

3. Judgment should be according to the laws, not by examples. The punishment for crimes, both misdemeanors and felonies, is prescribed by statute and extends from a simple fine with costs to the death penalty. Consult the statutes.

this prerogative, being founded in mercy, and immemorially exercised by the crown, is part of the common law. For hitherto, in every instance, all these exchanges have been for more merciful kinds of death.

To conclude, it is clear that **if, upon judgment to be hanged by the neck till he is dead, the criminal be not thoroughly killed,** but revives, the sheriff must hang him again [406]; for the former hanging was no execution of the sentence.

APPENDIX TO BOOK II.

[These appendices give an insight into the spirit of the old system that can be obtained in no other way. They are, therefore, retained in smaller type.—M. D. E.]

No. I.

VETUS CARTA FEOFFAMENTI.

[Premises] Sciant presentes et futuri, quod ego Willielmus, filius Willielmi de Segenho, dedi, concessi, et hac presenti carta mea confirmavi, Johanni quondam filio Johannis de Saleford, pro quadam summa pecunie quam michi dedit pre manibus, unam acram terre mee arabilis, jacentem in campo de Saleford, juxta terram quondam Richardi de la Mere: **[Habendum, & Tenendum.]** *Habendam et Tenendam* totam predictam acram terre, cum omnibus ejus pertinentiis, prefato Johanni, et heredibus suis, et suis assignatis, de capitalibus dominis feodi: **[Reddendum.]** *Reddendo* et faciendo annuatim eisdem dominis capitalibus servitia inde debita et consueta: **[Warranty.]** *Et* ego predictus Willielmus, et heredes mei, et mei assignati, totam predictam acram terre, cum omnibus suis pertinentiis, predicto Johanni de Saleford, et heredibus suis, et suis assignati, contra omnes gentes warrantizabimus in perpetuum. **[Conclusion.]** *In cujus* rei testimonium huic presenti carte sigillum meum apposui: *Hiis* testibus, Nigello de Saleford, Johanne de Seybroke, Radulpho clerico de Saleford, Johanne molendario de eadem villa, et aliis. *Data* apud Saleford die Veneris proximo ante festum sancte Margarete virginis, anno regni regis Edwardi filii regis Edwardi sexto.

(L. S.)

[Livery of seisin endorsed.] Memorandum, quod die et anno infrascriptis plena et pacifica seisina acre infraspecificate, cum pertinentiis, data et deliberata fuit per infranominatum Willielmum de Segenho infranominato Johnanni de Saleford, in propriis personis suis, secundum tenorem et effectum carte infrascripte, in presentia Nigelli de Saleford, Johannis de Seybroke, et aliorum.

No. II.

A MODERN CONVEYANCE BY LEASE AND RELEASE.

Sect. 1. Lease or Bargain and Sale, for a Year.

[Premises] This Indenture, made the third day of September, in the twenty-first year of the reign of our sovereign lord George the Second, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven. between **[Parties]** Abraham Barker, of Dale Hall, in the county of Norfolk, esquire, and Cecilia his wife, of the one part, and David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, and Francis Golding, of the

city of Norwich, clerk, of the other part, witnesseth; that the said Abraham Barker and Cecilia his wife **[Consideration]**, in consideration of five shillings of lawful money of Great Britain, to them in hand paid by the said David Edwards and Francis Golding, at, or before, the ensealing and delivery of these presents (the receipt whereof is hereby acknowledged), and for other good causes and considerations, them the said Abraham Barker and Cecilia his wife, hereunto specially moving, *have* bargained and sold **[Bargain and sale]**, and by these presents do, and each of them doth, bargain and sell, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns **[Parcels]**, *All* that the capital messuage, called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same, or any part thereof; and the reversion and reversions, remainder and remainders, yearly and other rents, issues, and profits thereof, and of every part and parcel thereof: **[Habendum]** *To have and to hold* the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned, or intended to be bargained and sold, and every part and parcel thereof, with hteir and every of their rights, members, and appurtenances, unto the said David Edwards and Francis Golding, their executors, administrators, and assigns, from the day next before the day of the date of these presents, for and during, and unto the full end and term of, one whole year from thence next ensuing, and fully to be complete and ended: **[Reddendum]** *Yielding* and paying, therefore, unto the said Abraham Barker, and Cecilia his wife, and their heirs and assigns, the yearly rent of one pepper-corn at the expiration of the said term, if the same shall be lawfully demanded: **[Intent]** *To the intent* and purpose that, by virtue of these presents, and of the statute for transferring uses into possession, the said David Edwards and Francis Golding may be in the actual possession of the premises, and be thereby enabled to take and accept a grant and release of the freehold; reversion, and inheritance of the same premises, and of every part and parcel thereof, to them, their heirs and assigns; to the uses and upon the trusts, thereof to be declared by another indenture, intended to bear date the next day after the day of the date hereof. **[Conclusion]** *In witness* whereof, the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)

SECT. 2. DEED OF RELEASE.

[Premises] This Indenture of five parts, made the fourth day of September, in the twenty-first year of the reign of our sovereign lord George the Second, by the grace of God, king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven, between **[Parties]** Abraham Barker, of Dale Hall, in the county of Norflok, esquire, and Cecilia his wife, of the first part; David Edwards, of Lincoln's Inn, in the county of Middlesex, esquire, executor of the last will and testament of Lewis Edwards of Cowbridge, in the county of

Glamorgan, gentleman, his late father, deceased, and Francis Golding, of the city of Norwich, clerk, of the second part; Charles Browne, of Enstone, in the county of Oxford, gentleman, and Richard More, of the city of Bristol, merchant, of the third part; John Barker, esquire, son and heir apparent of the said Abraham Barker, of the fourth part; and Katherine Edwards, spinster, one of the sisters of the said David Edwards, of the fifth part. [Recital] *Whereas* a marriage is intended, by the permission of God, to be shortly had and solemnized between the said John Barker and Katherine Edwards: *Now this Indenture witnesseth*, [Consideration], that in consideration of the said intended marriage, and the sum of five thousand pounds, of good and lawful money of Great Britain, to the said Abraham Barker, (by and with the consent and agreement of the said John Barker and Katherine Edwards, testified by their being parties to, and their sealing and delivery of, these presents), by the said David Edwards in hand paid, at or before the ensealing and delivery hereof, being the marriage portion of the said Katherine Edwards, bequeathed to her by the last will and testament of the said Lewis Edwards, her late father, deceased; the receipt and payment whereof the said Abraham Barker doth hereby acknowledge, and thereof, and of every part and parcel thereof, they the said Abraham Barker, John Barker, and Katherine Edwards, do, and each of them doth, release, acquit, and discharge the said David Edwards, his executors and administrators, for ever by these presents: and for providing a competent jointure and provision of maintenance for the said Katherine Edwards, in case she shall, after the said intended marriage had, survive and overlive the said John Barker, her intended husband: and for settling and assuring the capital messuage, lands, tenements, and hereditaments, hereinafter mentioned, unto such uses, and upon such trusts, as are hereinafter expressed and declared: and for and in consideration of the sum of five shillings, of lawful money of Great Britain, to the said Abraham Barker and Cecilia his wife, in hand paid by the said David Edwards and Francis Golding, and of ten shillings of like lawful money to them also in hand paid by the said Charles Browne and Richard More, at or before the ensealing and delivery hereof, (the several receipts whereof are hereby respectively acknowledgd), they the said Abraham Barker and Cecilia his wife, [Release] *Have*, and each of them hath, granted, bargained, sold, released, and confirmed, and by these presents do, and each of them doth, grant, bargain, sell, release, and confirm unto the said David Edwards and Francis Golding, their heirs and assigns, [Parcels] *All* that, the capital messuage called Dale Hall, in the parish of Dale, in the said county of Norfolk, wherein the said Abraham Barker and Cecilia his wife now dwell, and all those their lands in the said parish of Dale, called or known by the name of Wilson's farm, containing by estimation, five hundred and forty acres, be the same more or less, together with all and singular houses, dove-houses, barns, buildings, stables, yards, gardens, orchards, lands, tenements, meadows, pastures, feedings, commons, woods, underwoods, ways, waters, watercourses, fishings, privileges, profits, easements, commodities, advantages, emoluments, hereditaments, and appurtenances whatsoever to the said capital messuage and farm belonging or appertaining, or with the same used or enjoyed, or accepted, reputed, taken, or known, as part, parcel, or member thereof, or as belonging to the same or any part thereof; (all which said premises are now in the actual possession of the said David Edwards and Francis Golding, by virtue of [Mention of, bargain and sale], a bargain and sale to them thereof made by the said Abraham Barker and Cecilia his wife, for one whole year, in consideration of five shillings to them paid by the said David Edwards and Francis Golding, in and by one indenture, bearing date the day next before the day of the date hereof, and by force of the statute for transferring uses into possession); and the reversion and reversions, remainder and remainders, yearly and other rents, issues and profits thereof, and every part and parcel thereof, and also all the estate, right, title, interest, trust, property, claim, and demand whatsoever, both at law and in equity, of them the said Abraham Barker and Cecilia his wife, in, to, or out of the said capital

messuage, lands, tenements, hereditaments, and premises: **[Habendum]** *To have and to hold* the said capital messuage, lands, tenements, hereditaments, and all and singular other the premises hereinbefore mentioned to be hereby granted and released, with their and every of their appurtenances, unto the said David Edwards and Francis Golding, their heirs and assigns, to such uses, upon such trusts, and to and for such intents and purposes, as are hereinafter mentioned, expressed, and declared, of and concerning the same: that is to say, to the use and behoof of the said Abraham Barker and Cecilia his wife, **[To the use of the grantors till marriage]**, according to their several and respective estates and interests therein, at the time of, or immediately before, the execution of these presents, until the solemnization of the said intended marriage: and from and after the solemnization thereof, to the use and behoof of the said John Barker, for and during the term of his natural life; without impeachment of or for any manner of waste: and from and after the determination of that estate, **[Then of the husband for life, sans waste: Remainder to trustees to preserve contingent remainders]**, then to the use of the said David Edwards and Francis Golding, and their heirs, during the life of the said John Barker, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated and destroyed, and for that purpose to make entries, or bring actions, as the case shall require; but, nevertheless, to permit and suffer the said John Barker, and his assigns, during his life, to receive and take the rents and profits thereof, and of every part thereof, to and for his and their own use and benefit and from and after the decease of the said John Barker **[Remainder to the wife for life. for her jointure, in bar of dower]**, then to the use and behoof of the said Katherine Edwards, his intended wife, for and during the term of her natural life, for her jointure, and in lieu, bar, and satisfaction of her dower and thirds at common law, which she can or may have or claim, of, in, to, or out of, all and every, or any, of the lands, tenements, and hereditaments, whereof or wherein the said John Barker now is, or at any time or times hereafter during the coverture between them shall be, seised of any estate of freehold or inheritance: and from and after the decease of the said Katherine Edwards, or other sooner determination of the said estate **[Remainder to other trustees for a term. upon trusts after mentioned]**, then to the use and behoof of the said Charles Browne and Richard More, their executors, administrators, and assigns, for and during and unto the full end and term of five hundred years from thence next ensuing, and fully to be complete and ended, without impeachment of waste: upon such trusts nevertheless, and to and for such intents and purposes, and under and subject to such provisoes and agreements, as are hereinafter mentioned, expressed, and declared of and concerning the same: **[Remainder to the first and other sons of the marriage in tail]** and from and after the end, expiration, or other sooner determination of the said term of five hundred years, and subject thereunto, to the use and behoof of the first son of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, and of the heirs of the body of such first son lawfully issuing: and for default of such issue, then to the use and behoof of the second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, and of all and every other the son and sons of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, severally, successively, and in remainder one after another, as they and every of them shall be in seniority of age, and priority of birth, and of the several and respective heirs of the body and bodies of all and every such son and sons lawfully issuing; the elder of such sons, and the heirs of his body issuing, being always to be preferred and to take before the younger of such sons, and the heirs of his or their body or bodies issuing: **[Remainder to the daughters]** and for default of such issue, then to the use and behoof of all and every the daughter and daughters of the said John Barker on the body of the said Katherine Edwards his intended wife to be begotten, to be equally divided between them (if more than one), share and share alike **[as tenants in common, in tail]**, as tenants in common and not as joint-tenants, and of

the several and respective heirs of the body and bodies of all and every such daughter and daughters lawfully issuing: [Remainder to the husband in tail] and for default of such issue, then to the use and behoof of the heirs of the body of him the said John Barker lawfully issuing: [Remainder to the husband's mother in fee] and for default of such heirs, then to the use and behoof of the said Cecilia, the wife of the said Abraham Barker, and of her heirs and assigns for ever. [The trust of the terms declared] *And* as to, for, and concerning the term of five hundred years hereinbefore limited to the said Charles Browne and Richard More, their executors, administrators, and assigns, as aforesaid, it is hereby declared and agreed by and between all the said parties to these presents, that the same is so limited to them upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes and agreements, hereinafter mentioned, expressed, and declared, of and concerning the same: [To raise portions for younger children] that is to say, in case there shall be an eldest or only son and one or more other child or children of the said John Barker on the body of the said Katherine his intended wife to be begotten, then upon trust that they the said Charles Browne and Richard More, their executors, administrators, and assigns, by sale or mortgage of the said term of five hundred years, or by such other ways and means as they or the survivor of them, or the executors or administrators of such survivor, shall think fit, shall and do raise and levy, or borrow and take up at interest, the sum of four thousand pounds of lawful money of Great Britain, for the portion or portions of such other child or children (besides the eldest or only son) as aforesaid, to be equally divided between them (if more than one) share and share alike; the portion or portions of such of them as shall be a son or sons [payable at certain times] to be paid at his or their respective age or ages of twenty-one years; and the portion or portions of such of them as shall be a daughter or daughters to be paid at her or their respective age or ages of twenty-one years, or day or days of marriage, which shall first happen. And upon this further trust, that in the mean time and until the same portions shall become payable as aforesaid, the said Charles Browne and Richard More, their executors, administrators, and assigns, shall and do, by and out of the rents, issues, and profits of the premises aforesaid [with maintenance at the rate of 4 per cent.], raise and levy such competent yearly sum and sums of money for the maintenance and education of such child or children, as shall not exceed in the whole the interest of their respctive portions after the rate of four pounds in the hundred yearly. Provided always, that in case any of the same children shall happen to die before his, her, or their portions shall become payable as aforesaid [and benefit of survivorship], then the portion or portions of such of them so dying shall go and be paid unto and be equally divided among the survivor or survivors of them, when and at such time as the original portion or portions of such surviving child or children shall become payable as aforesaid. *Provided* also, that, in case there shall be no such child or children of [if no such child] the said John Barker on the body of the said Katherine his intended wife begotten, besides an eldest or only son; or [or if all die] in case all and every such child or children shall happen to die before all or any of their said portions shall become due and payable as aforesaid; or [or if the portions be raised] in case the said portions, and also such maintenance as aforesaid, shall by the said Charles Browne and Richard More, their executors, administrators, or assigns, be raised and levied by any of the ways and means in that behalf afore-mentioned; [or paid] or in case the same by such person or persons as shall for the time being be next in reversion or remainder of the same premises expectant upon the said term of five hundred years, shall be paid, [or secured by the person next in remainder; the residue of the term to cease] or well and duly secured to be paid, according to the true intent and meaning of these presents; then and in any of the said cases, and at all times thenceforth, the said term of five hundred years, or so much thereof as shall remain unsold or undisputed of for the purposes aforesaid, shall case, determine, and be utterly void to all intents and purposes, any

thing herein contained to the contrary thereof in any wise notwithstanding. [Condition, that the uses and estates hereby granted shall be void, on settling other lands of equal value in recompense] *Provided* also, and it is hereby further declared and agreed by and between all the said parties to these presents, that in case the said Abraham Barker or Cecilia his wife, at any time during their lives, or the life of the survivor of them, with the approbation of the said David Edwards and Francis Golding, or the survivor of them, or the executors and administrators of such survivor, shall settle, convey, and assure other lands and tenements of an estate of inheritance in fee-simple, in possession, in some convenient place or places within the realm of England, of equal or better value than the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, and in lieu and recompense thereof, unto and for such and the like uses, intents and purposes, and upon such and the like trusts, as the said capital messuafe, lands, tenements, hereditaments, and premises are hereby settled and assured unto and upon, then and in such case, and at all times from thenceforth, all and every the use and uses, trust and trusts, estate and estates hereinbefore limited, expressed, and declared of or concerning the same, shall cease, determine, and be utterly void to all intents and purposes; and the same capital messuage, lands, tenements, hereditaments, and premises, shall from thenceforth remain and be to and for the only proper use and behoof of the said Abraham Barker or Cecilia his wife, or the survivor of them, so settling, conveying, and assuring such other lands and tenements as aforesaid, and of his or her heirs and assigns for ever; and to and for no other use, intent, or purpose whatsoever; any thing herein contained to the contrary thereof in any wise notwithstanding. [Covenant to levy a fine] *And*, for the considerations aforesaid, and for barring all estate-tail, and all remainders or reversions thereupon expectant or depending, if any be now subsisting and unbarred or otherwise undetermined, of and in the said capital messuage, lands, tenements, hereditaments, and premises, hereby granted and released, or mentioned to be hereby granted and released, or any of them, or any part thereof, the said Abraham Barker for himself and the said Cecilia his wife, his and her heirs, executors, and administrators, and the said John Barker for himself, his heirs, executors, and administrators, do, and each of them doth, respectively covenant, promise, and grant, to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, by these presents, that they the said Abraham Barker and Cecilia his wife, and John Barker, shall and will, at the costs and charfes of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, acknowledge and levy, before his majesty's justices of the court of Common Pleas at Westminster, one or more fine or fines, *sur cognizance de droit, come ceo, &c.*, with proclamations according to the form of the statutes in that case made and provided, and the usual course of fines in such cases accustomed, unto the said David Edwards, and his heirs, of the said capital messuage, lands, tenements, hereditaments, and premises, by such apt and convenient names, quantities, qualities, number of acres and other descriptions to ascertain the same, as shall be thought meet; which said fine or fines so as aforesaid, or in any other manner, levied and acknowledged, or to be levied and acknowledged, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and are hereby declared by all the said parties to these presents to be and enure, to the use and behoof of the said David Edwards, and his heirs and assigns; [in order to make a tenant to the praecipe, that a recovery may be suffered] to the intent and purpose that the said David Edwards may, by virtue of the said fine or fines so covenanted and agreed to be levied as aforesaid, be and become perfect tenant of the freehold of the said capital messuage, lands, tenements, hereditaments, and all other the premises, to the end that one or more good and perfect common recovery or recoveries may be thereof had and suffered, in such manner as is hereinafter for that purpose mentioned. And it is hereby declared and agreed by and between all the said parties to

these presents, that it shall and may be lawful to and for the said Francis Golding, at the costs and charges of the said Abraham Barker, before the end of Michaelmas term next ensuing the date hereof, to sue forth and prosecute out of his majesty's high court of Chancery, one or more writ or writs of entry *sur disseisin en le post*, returnable before his majesty's Justices of the court of Common Pleas at Westminster, thereby demanding by apt and convenient names, quantities, qualities, number of acres, and other descriptions, the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards; to which said writ, or writs, of entry he the said David Edwards shall appear *gratis*, either in his own proper person, or by his attorney thereto lawfully authorized, and vouch over to warranty the said Abraham Barker and Cecilia his wife, and John Barker; who shall also *gratis* appear in their proper persons, or by their attorney or attornies, thereto lawfully authorized, and enter into the warranty, and vouch over to warranty the common vouchee of the same court; who shall also appear, and after imparlance shall make default: so as judgment shall and may be thereupon had and given for the said Francis Golding, to recover the said capital messuage, lands, tenements, hereditaments, and premises, against the said David Edwards, and for him to recover in value against the said Abraham Barker and Cecilia his wife, and John Barker, and for them to recover in value against the said common vouchee, and that execution shall and may be thereupon awarded and had accordingly, and all and every other act and thing be done and executed, needful and requisite for the suffering and perfecting of such common recovery or recoveries, with vouchers as aforesaid. **[to enure]** And it is hereby further declared and agreed by and between all the said parties to these presents, that immediately from and after the suffering and perfecting of the said recovery or recoveries, so as aforesaid, or in any other manner, or at any other time or times, suffered or to be suffered, as well these presents and the assurance hereby made, and the said fine or fines so covenanted to be levied as aforesaid, as also the said recovery or recoveries, and also all and every other fine or fines, recovery and recoveries, conveyances, and assurances in the law whatsoever heretofore had, made, levied, suffered, or executed, or hereafter to be had, made, levied, suffered, or executed, of the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by and between the said parties to these presents, or any of them, or whereunto they or any of them are or shall be parties or privies, shall be and enure, and shall be adjudged, deemed, construed, and taken, and so are and were meant and intended, to be and enure, and the recoveror or recoverors in the said recovery or recoveries named or to be named, and his or their heirs, shall stand and be seised of the said capital messuage, lands, tenements, hereditaments, and premises, and of every part and parcel thereof, **[to the preceding uses in this deed]**, to the uses, upon the trusts, and to and for the intents and purposes, and under and subject to the provisoes, limitations, and agreements, hereinbefore mentioned, expressed, and declared, of and concerning the same. **[Other covenants; for quiet enjoyment]** *And* the said Abraham Barker, party hereunto, doth hereby, for himself, his heirs, executors, and administrators, further covenant, promise, grant and agree to and with the said David Edwards and Francis Golding, their heirs, executors, and administrators, in manner and form following; that is to say, that the said capital messuage, lands, tenements, hereditaments, and premises, shall and may at all times hereafter remain, continue, and be, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements, hereinbefore mentioned, expressed, and declared, of and concerning the same; and shall and may be peaceably and quietly had, held, and enjoyed accordingly, without any lawful let or interruption of or by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs or assigns, or of or by any other person or persons lawfully claiming or to claim from, by, or under, or in trust for, him, her, them, or any of them; or from, by, or under his or her ancestors, or any of them; **[free from incumbrances]** and shall so remain, con-

tinue, and be, free and clear, and freely and clearly acquitted, exonerated, and discharged, or otherwise by the said Abraham Barker or Cecilia his wife, parties hereunto, his or her heirs, executors, or administrators, well and sufficiently saved, defended, kept harmless, and indemnified, of, from, and against all former and other gifts, grants, bargains, sales, leases, mortgages, estates, titles, troubles, charges, and incumbrances whatsoever, had, made, done, committed, occasioned, or suffered, or to be had, made, done, committed, occasioned, or suffered, by the said Abraham Barker or Cecilia his wife, or by his or her ancestors, or any of them, or by his, her, their, or any of their, act, means, assent, consent, or procurement: [and for further assurance] *And moreover* that he the said Abraham Barker and Cecilia his wife, parties hereunto, and his or her heirs, and all other persons having or lawfully claiming, or which shall or may have or lawfully claim, any estate, right, title, trust, or interest, at law or in equity, of, in, to, or out of, the said capital messuage, lands, tenements, hereditaments, and premises, or any of them, or any part thereof, by or under or in trust for him, her, them, or any of them, or by or under his or her ancestors or any of them, shall and will, from time to time, and at all times hereafter, upon every reasonable request, and at the costs and charges of the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, make, do, and execute, or cause to be made, done, and executed, all such further and other lawful and reasonable acts, deeds, conveyances, and assurances in the law whatsoever, for the further, better, more perfect, and absolute granting, conveying, settling, and assuring of the same capital messuage, lands, tenements, hereditaments, and premises, to and for the uses and purposes, upon the trusts, and under and subject to the provisoes, limitations, and agreements hereinbefore mentioned, expressed, and declared, of and concerning the same, as by the said David Edwards and Francis Golding, or either of them, their or either of their heirs, executors, or administrators, or their or any of their counsel learned in the law, shall be reasonably advised, devised, or required: so as such further assurances contain in them no further or other warranty or covenants than against the person or persons, his, her, or their heirs, who shall make or do the same; and so as the party or parties who shall be requested to make such further assurances, be not compelled or compellable, for making or doing thereof, to go and travel above five miles from his, her, or their then respective dwellings, or places of abode. [Power of revocation] *Provided lastly*, and it is hereby further declared and agreed by and between all the parties to these presents, that it shall and may be lawful to and for the said Abraham Barker and Cecilia his wife, John Barker and Katherine his intended wife, and David Edwards, at any time or times hereafter, during their joint lives, by any writing or writings under their respective hands and seals, and attested by two or more credible witnesses, to revoke, make void, alter or change all and every or any the use and uses, estate and estates, herein and hereby before limited and declared, or mentioned or intended to be limited and declared, of and in the capital messuage, lands, tenements, hereditaments, and premises aforesaid, or of and in any part or parcel thereof, and to declare new and other uses of the same, or of any part or parcel thereof, any thing herein contained to the contrary thereof in any wise notwithstanding. [Conclusion] *In witness* whereof the parties to these presents their hands and seals have subscribed and set, the day and year first above written.

Sealed and delivered, being first duly stamped, in the presence of
George Carter.
William Browne.

Abraham Barker. (L. S.)
Cecilia Barker. (L. S.)
David Edwards. (L. S.)
Francis Golding. (L. S.)
Charles Browne. (L. S.)
Richard More. (L. S.)
John Barker. (L. S.)
Katherine Edwards. (L. S.)

No. III.

AN OBLIGATION, OR BOND, WITH CONDITION FOR THE PAYMENT OF MONEY.

KNOW ALL MEN by these presents, that I David Edwards of Lincoln's Inn, in the county of Middlesex, esquire, am held and firmly bound to Abraham Barker of Dale Hall in the county of Norfolk, esquire, in ten thousand pounds of lawful money of Great Britain, to be paid to the said Abraham Barker, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, I bind myself, my heirs, executors, and administrators, firmly by these presents, sealed with my seal. Dated the fourth day of September in the twenty-first year of the reign of our sovereign lord George the Second, by the grace of God king of Great Britain, France, and Ireland, defender of the faith, and so forth, and in the year of our Lord one thousand seven hundred and forty-seven.

The condition of this obligation is such, that if the above-bounden David Edwards, his heirs, executors, or administrators, do and shall well and truly pay, or cause to be paid, unto the above-named Abraham Barker, his executors, administrators, or assigns, the full sum of five thousand pounds of lawful British money, with lawful interest for the same, on the fourth day of March next ensuing the date of the above-written obligation, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first duly stamped, in the presence of George Carter. William Browne. } David Edwards. (L. S.)

No. IV.

A FINE OF LANDS SUR COGNIZANCE DE DROIT, COME CEO, &c.

SECT. 1. WRIT OF COVENANT; OR PRAECIPE.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. *Command* Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, that justly and without delay they perform to David Edwards, esquire, the covenant made between them of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale; and unless they shall so do, and if the said David shall give you security of prosecuting his claim, then summon by good summoners the said Abraham, Cecilia, and John that they appear before our justices at Westminster, from the day of St. Michael in one month, to shew wherefore they have not done it: and have you there the summoners, and this writ. *Witness* ourself at Westminster the ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution. { John Doe. Richard Roe.

[Sheriff's return] Summoners of the within-named Abraham, Cecilia, and John. } John Den. Richard Fen.

SECT. 2. THE LICENCE TO AGREE.

Norfolk, to wit. } DAVID EDWARDS, esquire, gives to the lord the king ten marks, for license to agree with Abraham Barker, esquire, of a plea of covenant of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale.

SECT. 3. THE CONCORD.

AND the agreement is such, to wit, that the aforesaid Abraham, Cecilia, and John have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs, for ever. And further, the same Abraham, Cecilia, and John have granted, for themselves and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 4. THE NOTE OR ABSTRACT.

Norfolk, to wit. } BETWEEN David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them: to wit, that the said Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those they have remised and quitted claim, from them and their heirs, to the aforesaid David and his heirs for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves, and their heirs, that they will warrant to the aforesaid David, and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quit-claim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 5. THE FOOT, CHIROGRAPH, OR INDENTURES OF THE FINE.

Norfolk, to wit. } THIS IS THE FINAL AGREEMENT, made in the court of the lord the king at Westminster, from the day of Saint Michael in one month, in the twenty-first year of the reign of the lord George the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, before John Willes, Thomas Abney, Thomas Burnet, and Thomas Birch, justices, and other faithful subjects of the lord the king then there present, between David Edwards, esquire, complainant, and Abraham Barker, esquire, and Cecilia his wife, and John Barker, esquire, deforciants, of two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, whereupon a plea of covenant was summoned between them in the said court; to wit, that the aforesaid Abraham, Cecilia, and John, have acknowledged the aforesaid tenements, with the appurtenances, to be the right of him the said David, as those which the said David hath of the gift of the aforesaid Abraham, Cecilia, and John; and those

they have remised and quitted claim, from them and their heirs, to the aforesaid David, and his heirs, for ever. And further, the same Abraham, Cecilia, and John, have granted for themselves and their heirs, that they will warrant to the aforesaid David and his heirs, the aforesaid tenements, with the appurtenances, against all men, for ever. And for this recognition, remise, quitclaim, warranty, fine, and agreement, the said David hath given to the said Abraham, Cecilia, and John, two hundred pounds sterling.

SECT. 6. PROCLAMATIONS, ENDORSED UPON THE FINE, ACCORDING TO THE STATUTES.

THE FIRST proclamation was made the sixteenth day of November, in the term of Saint Michael, in the twenty-first year of the king within-written.

The second proclamation was made the fourth day of February, in the term of Saint Hilary, in the twenty-first year of the king within-written.

The third proclamation was made the thirteenth day of May, in the term of Easter, in the twenty-first year of the king within-written.

The fourth proclamation was made the twenty-eighth day of June, in the term of the holy Trinity, in the twenty-second year of the king within-written.

No. V.

A COMMON RECOVERY OF LANDS WITH* DOUBLE VOUCHER.

SECT. 1. WRIT OF ENTRY SUB DISSEISIN IN THE POST; OR PRAECIPE.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to the sheriff of Norfolk, greeting. *Command* David Edwards, esquire, that, justly and without delay, he render to Francis Golding, clerk, two messuages, two gardens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, which he claims to be his right and inheritance, and into which the said David hath not entry, unless after the disseisin, which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past, as he saith, and whereupon he complains that the aforesaid David deforceth him. And unless he shall so do, and if the said Francis shall give you security of prosecuting his claim, then summon by good summoners the said David, that he appear before our justices at Westminster on the octave of Saint Martin, to shew wherefore he hath not done it: and have you there the summoners, and this writ. *Witness* ourself at Westminster, the twenty-ninth day of October, in the twenty-first year of our reign.

Pledges of prosecution. John Doe. Richard Roe.

[Sheriff's return] Summoners of the within-named David. John Den. Richard Fen.

SECT. 2. EXEMPLIFICATION OF THE RECOVERY ROLL.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland king, defender of the faith, and so forth, to all to whom these our present letters shall come, greeting. *Know ye*, that among the pleas of land enrolled at Westminster, before Sir John Willes, knight, and his fellows, our justices of the bench, of the term of Saint Michael, in the twenty-first year of our reign, upon the fifty-second roll it is thus contained: [Return. Demand

*Note, that, if the recovery be had with single voucher, the parts marked "thus" in sect. 2, are omitted.

against the tenant] *Entry* returnable on the octave of Saint Martin. *Norfolk*, to wit: Francis Golding, clerk, in his proper person demandeth against David Edwards, esquire, two messuages, two gradens, three hundred acres of land, one hundred acres of meadow, two hundred acres of pasture, and fifty acres of wood, with the appurtenances, in Dale, as his right and inheritance, and into which the said David hath not entry, unless after the disseisin which Hugh Hunt thereof unjustly, and without judgment, hath made to the aforesaid Francis, within thirty years now last past. [Count] And whereupon he saith, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, [Esplees] by taking the profits thereof to the value [*of six shillings and eight pence, and more, in rents, corn, and grass]: and into which [the said David hath not entry, unless as aforesaid] and thereupon he bringeth suit [and good proof]. [Defence of the tenant. Voucher. Warranty.] *And* the said David in his proper person comes and defendeth his right, when [and where it shall behove him], and thereupon voucheth to warranty "John "Barker, esquire; who is present here in court in his proper person, and the "tenements aforesaid, with the appurtenances to him freely warranteth [and "prays that the said Francis may count against him.]. [Demand against the "vouchee] *And* hereupon the said Francis demandeth against the said John, "tenant by his own warranty, the tenements aforesaid, with the appurten-"ances, in form aforesaid, &c. [Count] And whereupon he saith, that he "himself was seised of the tenements aforesaid, with the appurtenances, in "his demesne as of fee and right, in time of peace, in the time of the lord "the king that now is, by taking the profits thereof to the value, &c. And "into which, &c. And thereupon he bringeth suit, &c. [Defence of the "vouchee] *And* the aforesaid John, tenant by his own warranty, defends his "right, when, &c., and thereupon he further voucheth to warranty" Jacob Moreland; who is present here in court in his proper person, and the tenements aforesaid, with the appurtenances, to him freely warranteth, &c. [Second voucher. Warranty. Demand against the common vouchee. Count] *And* hereupon the said Francis demandeth against the said Jacob, tenant by his own warranty, the tenements aforesaid, with the appurtenances, in form aforesaid, &c. And whereupon he saith, that he himself was seized of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in time of peace, in the time of the lord the king that now is, by taking the profits thereof to the value, &c. And into which, &c. And thereupon he bringeth suit, &c. [Defence of the common vouchee] *And* the aforesaid Jacob, tenant by his own warranty, defends his right, when, &c. [Plea, nul disseisin] And saith that the aforesaid Hugh did not disseise the aforesaid Francis of the tenements aforesaid, as the aforesaid Francis by his writ and count aforesaid above doth suppose: and of this he puts himself upon the country. [Imparlance. Default of the common vouchee] *And* the aforesaid Francis thereupon craveth leave to imparl; and he hath it. And afterwards the aforesaid Francis cometh again here into court, in this same term in his proper person, and the aforesaid Jacob, though solemnly called, cometh not again, but hath departed in contempt of the court, and maketh default. [Judgment for the demandant] *Therefore it is considered*, that the aforesaid Francis do recover his seisin against the aforesaid David of the tenements aforesaid, with the appurtenances: and that the said David have of the land of the aforesaid "John, to the value [of the tenements aforesaid]; and further, that the said "John [Recovery in value] have of the land of the said" Jacob to the value [of the tenements aforesaid] [Amercement] And the said Jacob in mercy. *And* hereupon the said Francis prays a writ of the lord the king, to be directed to the sheriff of the county aforesaid, to cause him to have full seisin of the

*The clauses between hooks are no otherwise expressed in the record than by an &c.

tenements aforesaid, with the appurtenances: and it is granted unto him, returnable here without delay. [Award of the writ reisin, and return] Afterwards, that is to say, the twenty-eighth day of November in this same term, here cometh the said Francis in his proper person; and the sheriff, namely, Sir Charles Thompson, knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the twenty-fourth day of the same month, did cause the said Francis to have full seisin of the tenements aforesaid with the appurtenances, as he was commanded. [Exemplification continued] *All and singular* which premises, at the request of the said Francis, by the tenor of these presents, we have held good to be exemplified. In testimony whereof we have caused our seal, appointed for sealing writs in the Bench aforesaid, to be affixed to these presents. [Teste] *Witness* Sir John Willes, knight, at Westminster, the twenty-eighth day of November, in the twenty-first year of our reign.

COOKE.

APPENDIX TO BOOK III.

No. I.

Proceedings on a Writ of Right Patent.

Sect. 1. *Writ of* Right *Patent in the* Court Baron.

George the Second, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to Willoughby, Earl of Abingdon, greeting. We command you that without delay you hold full right to William Kent, Esquire, of one messuage and twenty acres of land, with the appurtenances, in Dorchester, which he claims to hold of you by the free service of one penny yearly in lieu of all services, of which Richard Allen deforces him. And unless you do so, let the Sheriff of Oxfordshire do it, that we no longer hear complaint thereof for defect of right. Witness ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign.

Pledges of prosecution, { John Doe, / Richard Roe.

Sect. 2. *Writ of* Tolt, *to remove it into the* County Court.

Charles Morton, Esquire, Sheriff of Oxfordshire, to John Long, Bailiff errant of our Lord the King and of myself, greeting. Because by the complaint of William Kent, Esquire, personally present at my County Court, to wit, on Monday, the sixth day of September in the thirtieth year of the reign of our Lord George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, at Oxford, in the shirehouse there holden, I am informed, that although he himself the writ of our said lord the King of right patent directed to Willoughby, Earl of Abingdon, for this that [*ii] *he should hold full right to the said William Kent, of one messuage and twenty acres of land, with the appurtenances, in Dorchester, within my said county, of which Richard Allen deforces him, hath brought to the said Willoughby, Earl of Abingdon; yet for that the said Willoughby, Earl of Abingdon, favoureth the said Richard Allen in this part, and hath hitherto delayed to do full right according to the exigence of the said writ, I command you on the part of our said Lord the King, firmly enjoining, that in your proper person you go to the Court Baron of the said Willoughby, Earl of Abingdon, at Dorchester aforesaid, and take away the plaint, which there is between the said William Kent and Richard Allen by the said writ, into my County Court to be next holden; and summon by good summoners the said Richard Allen, that he be at my County Court, on Monday, the fourth day of October next coming, at Oxford, in the shirehouse there to be holden, to answer to the said William Kent thereof. And have you there then the said plaint, the summoners, and this precept. Given in my County Court, at Oxford, in the shirehouse, the sixth day of September, in the year aforesaid.

Sect. 3. *Writ of* Pone, *to remove it into the Court of* Common Pleas.

George the Second, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the Sheriff of Oxfordshire,

greeting. PUT at the request of William Kent, before our justices at Westminster, on the Morrow of All Souls, the plaint which is in your County Court by our writ of right, between the said William Kent, demandant, and Richard Allen, tenant, of one messuage and twenty acres of land, with the appurtenances, in Dorchester; and summon by good summoners the said Richard Allen, that he be then there, to answer to the said William Kent thereof. And have you there the summoners and this writ. WITNESS ourself at Westminster, the tenth day of September, in the thirtieth year of our reign.

Sect. 4. *Writ of* RIGHT, quia Dominus remist Curiam.

GEORGE the Second, by the Grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the Sheriff of Oxfordshire, greeting. COMMAND Richard Allen, that he justly and without delay render unto William Kent one messuage and twenty acres of land, with the appurtenances, in Dorchester, which he claims to be his right and inheritance, and whereupon he complains that the aforesaid Richard, unjustly deforces him. And unless he shall so do, and [*iii] *if the said William shall give you security of prosecuting his claim, then summon by good summoners the said Richard, that he appear before our justices at Westminster, on the Morrow of All Souls, to show wherefore he hath not done it. And have you there the summoners and this writ. WITNESS ourself at Westminster, the twentieth day of August, in the thirtieth year of our reign. Because Willoughby, Earl of Abingdon, the chief lord of that fee, hath thereupon remised unto us his court.

Pledges of prosecution, { JOHN DOE, RICH. ROE.

[Sheriff's return] Summoners of the within-named Richard, { JOHN DEN. RICH. FEN.

Sect. 5. *The Record, with the award of Battel.*†

PLEAS at Westminster before Sir John Willes, Knight, and his brethern, Justices of the Bench of the Lord the King at Westminster, of the term of Saint Michael, in the thirtieth year of the reign of the Lord GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c.

[Writ] *Oxon, to wit.* { WILLIAM KENT, Esquire, by James Parker, his attorney, demands against Richard Allen, Gentleman, one messuage and twenty acres of land, with the appurtenances, in Dorchester, as his right and inheritance, by writ of the Lord the King of right, [Dominus remisit curiam] BECAUSE Willoughby, Earl of Abingdon, the chief lord of that fee, hath now thereupon remised to the Lord the King his court. [Count] AND WHEREUPON he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the Lord GEORGE the First, late King of Great Britain, [Esplees] by taking the esplees thereof to the value‡ [of ten shillings, and more, in rents, corn, and grass.] And that such is his right he offers [suit and good proof.] [Defence] AND the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, and his seisin, when [and where it shall behove him,] and all [that concerns it,] and whatsoever [he ought to defend] and chiefly the tenements aforesaid, with the appurtenances, as of fee and right, [namely, one messuage and twenty acres of land, with appurtenances in Dorchester.] [Wager of battle] AND this he is ready to defend by the body of his freeman, George Rumbold by name, who

† As to battle, see page 337, n. 7.

‡ N. B. The clauses between hooks, in this and the subsequent numbers of the Appendix, are usually no otherwise expressed in the Records than by an &c.

is present here in court, ready to defend the same by his body, or in what manner soever the Court of the Lord the King shall consider that he ought to defend. [*iv] *And if any mischance should befal the said George, (which God defend, he is ready to defend the same by another man, who [is bounden and able to defend it.] [Replication] AND the said William Kent saith, that the said Richard Allen unjustly defends the right of him the said William, and his seisin, &c., and all, &c., and whatsoever, &c., and chiefly of the tenements aforesaid with the appurtenances, as of fee and right, &c.; because he saith, that he himself was seised of the tenements aforesaid, with the appurtenances, in his demesne as of fee and right, in the time of peace, in the time of the said Lord GEORGE the First, late King of Great Britain, by taking the esplees thereof to the value, &c. [Joinder of battel.] AND that such is his right, he is prepared to prove by the body of his freeman, Henry Broughton by name, who is present here in Court ready to prove the same by his body, or in what manner soever the Court of the Lord the King shall consider that he ought to prove; and if any mischance should befal the said Henry, (which God defend,) he is ready to prove the same by another man, who, &c. AND hereupon it is demanded of the said George and Henry, whether they are ready to make battel, as they beefore have waged it; who say that they are. [Gages given] AND the same George Rumbold giveth gage of defending, and the said Henry Broughton giveth gage of proving; and such engagement being given as the manner is, it is demanded of the said William Kent and Richard Allen, if they can say anything wherefore battel ought not to be awarded in this case; who say that they cannot. [Award of Battel] THEREFORE IT IS CONSIDERED, that battel be made thereon, &c. [Pledges] AND the said George Rumbold findeth pledges of battel, to wit, Paul Jenkins and Charles Carter; and the said Henry Broughton findeth also pledges of battel, to wit, Reginald Read and Simon Taylor. [Continuance] AND THEREUPON day is here given as well to the said William Kent as to the said Richard Allen, to wit, on the morrow of Saint Martin next coming, by the assent as well of the said William Kent as of the said Richard Allen. And it is commanded that each of them then have here his champion, sufficiently furnished with competent armour as becomes him, and ready to make the battel aforesaid: and that the bodies of them in the mean time be safely kept, on peril that shall fall thereon. [Champions appear] AT which day here come as well the said William Kent as the said Richard Allen by their attornies aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battel aforesaid, as they had before waged it. [Adjournment to Tothill Fields] AND hereupon day is further given by the court here, as well to the said William Kent as to the said Richard Allen, at Tothill, near the city of Westminster, in the county of Middlesex, to wit, on the Morrow of the Purification of the Blessed Virgin Mary next coming, by the assent as well of the said [*v] *William as of the aforesaid Richard. And it is commanded, that each of them have then there his champion, armed in the form aforesaid, ready to make the battel aforesaid, and that their bodies in the mean time, &c. At which day here, to wit, at Tothill aforesaid, comes the said Richard Allen by his attorney aforesaid, and the said George Rumbold and Henry Broughton in their proper persons likewise come, sufficiently furnished with competent armour as becomes them, ready to make the battel aforesaid, as they before had waged it. [Demandant nonsuit] And the said William Kent being solemnly called doth not come, nor hath prosecuted his writ aforesaid. [Final judgment for the tenant] THEREFORE IT IS CONSIDERED, that the same William and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint, and that the same Richard go thereof without a day, &c., and also that the said Richard do hold the tenements aforesaid with the appurtenances, to him and his heirs, quit of the said William and his heirs, for ever, &c.

Sect. 6. *Trial by the Grand Assize.*

[Defence] ——And the said Richard Allen, by Peter Jones, his attorney, comes and defends the right of the said William Kent, and his seisin, when, &c. and all, &c. and whatsoever, &c. and chiefly of the tenements aforesaid with the appurtenances, as of fee and right, &c. **[Mise]** and puts himself upon the grand assize of the Lord the King, and prays recognition to be made, whether he himself hath greater right to hold the tenements aforesaid with the appurtenances to him and his heirs as tenants thereof as he now holdeth them, or the said William to have the said tenements with the appurtenances, as he above demandeth them. **[Tender of demi-mark]** AND he tenders here in Court six shillings and eight-pence to the use of the Lord the now King, &c. for that, to wit, it may be inquired of the time [of the seisin alleged by the said William.] And he therefore prays, that it may be inquired by the assize, whether the said William Kent was seised of the tenements aforesaid with the appurtenances in his demesne as of fee in the time of the said Lord the King George the First, as the said William in his demand before hath alleged. **[Summons of the knights]** THEREFORE it is commanded the sheriff, that he summon by good summoners four lawful knights of his county, girt with swords, that they be here on the octaves of Saint Hilary next coming, to make election of the assize aforesaid. The same day is given as well to the said William Kent as to the said Richard Allen here, &c. At which day here come as well the said William Kent, as the said Richard Allen; **[Return]** and the sheriff, to wit, Sir Adam Alstone, Knight, now returns, that he had caused to be summoned Charles Stephens, Randel Wheler, Toby Cox, and Thomas Munday, four lawful knights of [*vi] *his country, girt with swords, by John Doe and Richard Roe his bailiffs, to be here at the said octaves of Saint Hilary, to do as the said writ thereof commands and requires; and that the said summoners, and each of them, are mainprized by John Day and James Fletcher. **[Election of the recognitors]** Whereupon the said Charles Stephens, Randel Wheler, Toby Cox, and Thomas Munday, four lawful knights of the county aforesaid, girt with swords, being called, in their proper persons come, and being sworn upon their oath in the presence of the parties aforesaid, chose of themselves and others twenty-four, to wit, Charls Stephens, Randel Wheler, Toby Cox, Thomas Munday, Oliver Greenway, John Boys, Charles Price, knights; Daniel Prince, William Day, Roger Lucas, Patrick Fleming, James Harris, John Richardson, Alexander Moore, Peter Payne, Robert Quin, Archibald Stuart, Bartholomew Norton, and Henry Davis, esquires; John Porter, Christopher Ball, Benjamin Robinson, Lewis Long, William Kirby, gentlemen, good and lawful men of the county aforesaid, who neither are of kin to the said William Kent nor to the said Richard Allen, to make recognition of the grand assize aforesaid. **[Venire facias]** THEREFORE it is commanded the sheriff, that he cause them to come here from the day of Easter in fifteen days, to make the recognition aforesaid. The same day is there given to the parties aforesaid. **[Recognitors sworn]** At which day here come as well the said William Kent as the said Richard Allen, by their attornies aforesaid, **[Verdict for the demandant]** and the recognitors of the assize, whereof mention is made above, being called come, and certain of them, to wit, Charles Stephens, Randel Wheler, Toby Cox, Thomas Munday, Charles Price, knights; Daniel Prince, Roger Lucas, William Day, James Harris, Peter Payne, Robert Quin, Henry Davis, John Porter, Christopher Ball, Lewis Long, and William Kirby, being elected, tried, and sworn upon their oath say, that the said William Kent hath more right to have the tenements aforesaid with the appurtenances to him and his heirs, as he demandeth the same, than the said Richard Allen to hold the same as he now holdeth them, according as the said William Kent by his writ aforesaid hath supposed. **[Judgment]** THEREFORE IT IS CONSIDERED, that the said William Kent do recover his seisin against the said Richard Allen of the tenements aforesaid, with the appurtenances, to him and his heirs, quit of the said Richard Allen and his heirs for ever: and the said Richard Allen in mercy, &c.

[*vii] *No. II.

Proceedings on an Action of Trespass in Ejectment, by Original, in the King's Bench.

Sect. 1. *The Original Writ.*

[Si fecerit te securum] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the Sheriff of Berkshire, greeting. IF Richard Smith shall give you security of prosecuting his claim, then put by gage and safe pledges William Stiles, late of Newbury, gentleman, so that he be before us on the morrow of All-Souls, wheresoever we shall then be in England, to show wherefore with force and arms he entered into one messuage with the appurtenances, in Sutton, which John Rogers, Esquire, hath demised to the aforesaid Richard, for a term which is not yet expired, and ejected him from his said farm, and other enormities to him did, to the great damage of the said Richard, and against our peace. And have you there the names of the pledges and this writ. WITNESS ourself at Westminster, the twelfth day of October, in the twenty-ninth year of our reign.

Pledges of prosecution, JOHN DOE, RICHARD ROE.

[Sheriff's return] The within-named William Stiles is attached by pledges. JOHN DEN. RICHARD FEN.

Sect. 2. *Copy of the Declaration against the casual Ejector, who gives Notice thereupon to the Tenant in Possession.*

Michaelmas, the 29th of King George the Second.

Berks, to wit. WILLIAM STILES, late of Newbury in the said county, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage with the appurtenances, in Sutton in the county aforesaid, which John Rogers, Esquire, demised to the said Richard Smith for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the Lord the King, &c. And whereupon the said Richard by [*vii] *Robert Martin his attorney complains, that whereas the said John Rogers, on the first day of October, in the twenty-ninth year of the reign of the Lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the Feast of Saint Michael the Archangel then last past, to the end and term of five years from thence next following and fully to be complete and ended, by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed; and the said Richard being so possessed thereof, the said William afterwards, that is to say, on the said first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement, with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said Lord the King; whereby the said Richard saith, that he is injured and damaged to the value of twenty pounds. And thereupon he brings suit, &c.

MARTIN, for the plaintiff,
PETERS, for the defendant.

Pledges of prosecution. JOHN DOE, RICHARD ROE.

[Notice.]
Mr. GEORGE SAUNDERS,

I am informed that you are in possession of, or claim title to, the premises mentioned in this declaration of ejectment, or to some part thereof; and I, being sued in this action as a casual ejector, and having no claim or title to the same, do advise you to appear next Hilary Term in his Majesty's Court of King's Bench at Westminster, by some attorney of that Court, and then and there by a rule to be made of the same Court, to cause yourself to be made defendant in my stead; otherwise I shall suffer judgment to be entered against me, and you will be turned out of possession.

Your loving friend,

WILLIAM STILES,

5th January, 1756.

[*ix] *Sect. 3. *The Rule of Court.*

Hilary Term, in the twenty-ninth Year of King GEORGE the Second.

Berks, to wit. } IT IS ORDERED by the Court, by the assent of both parties, and their attornies, that George Saunders, gentleman, may be made defendant, in the place of the now defendant, William Stiles, and shall immediately appear to the plaintiff's action, and shall receive a declaration in a plea of trespass and ejectment of the tenements in question, and shall immediately plead thereto Not Guilty: and, upon the trial of the issue, shall confess lease, entry, and ouster, and insist upon his title only. And if upon the trial of the issue, the said George do not confess lease, entry, and ouster, and by reason thereof the plaintiff cannot prosecute his writ, then the taxation of costs upon such *non pros.* shall cease, and the said George shall pay such costs to the plaintiff, as by the Court of our Lord the King here shall be taxed and adjudged, for such his default in non-performance of this rule; and judgment shall be entered against the said William Stiles, now the casual ejector, by default. And it is further ordered, that if upon the trial of the said issue a verdict shall be given for the defendant, or if the plaintiff shall not prosecute his writ upon any other cause than for the not confessing lease, entry, and ouster as aforesaid, then the lessor of the plaintiff shall pay costs, if the plaintiff himself doth not pay them.

By the Court.

MARTIN, for the plaintiff.
NEWMAN, for the defendant.

Sect. 4. *The Record.*

PLEAS before the Lord the King at Westminster, of the Term of Saint Hilary, in the twenty-ninth Year of the Reign of the Lord George the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c.

Berks, to wit. } GEORGE SAUNDERS, late of Sutton in the county aforesaid, gentleman, was attached to answer Richard Smith, of a plea, wherefore with force and arms he entered into one messuage, with the appurtenances, in Sutton, which John Rogers, Esq. hath demised to the said Richard for a term which is not yet expired, and ejected him from his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the Lord the King that [*x] *now is. [Declaration, or count] AND WHEREUPON the said Richard by Robert Martin, his attorney, complains, that whereas the said John Rogers on the first day of October in the twenty-ninth year of the reign of the Lord the King that now is, at Sutton aforesaid, had demised to the same Richard the tenement aforesaid, with the appurtenances, to have and to hold the said tenement, with the appurtenances, to the said Richard and his assigns, from the feast of Saint Michael the Archangel then

last past, to the end and term of five years from thence next following and fully to be complete and ended; by virtue of which demise the said Richard entered into the said tenement, with the appurtenances, and was thereof possessed: and, the said Richard being so possessed thereof, the said George afterwards, that is to say, on the first day of October in the said twenty-ninth year, with force and arms, that is to say, with swords, staves, and knives, entered into the said tenement with the appurtenances, which the said John Rogers demised to the said Richard in form aforesaid for the term aforesaid, which is not yet expired, and ejected the said Richard out of his said farm, and other wrongs to him did, to the great damage of the said Richard, and against the peace of the said Lord the King; whereby the said Richard saith that he is injured and endamaged to the value of twenty pounds; and thereupon he brings suit, [and good proof.] **[Defence]** AND the aforesaid George Sanders, by Charles Newman, his attorney comes and defends the force and injury, when [and where it shall behove him;] **[Plea, not guilty]** and saith that he is in no wise guilty of the trespass and ejectment aforesaid, as the said Richard above complains against him; **[Issue]** and thereof he puts himself upon the country; and the said Richard doth likewise the same; **[Venire awarded]** THEREFORE let a jury come thereupon before the Lord the King, on the octave of the purification of the blessed Virgin Mary, wheresoever he shall then be in England, who neither [are of kin to the said Richard, nor to the said George,] to recognize [whether the said George be guilty of the trespass and ejectment aforesaid;] because as well [the said George as the said Richard, between whom the difference is, have put themselves on the said jury.] The same day is there given to the parties aforesaid. **[Respite, for default of jurors]** AFTERWARDS the process therein, being continued between the said parties of the plea aforesaid by the jury, is put between them in respite, before the Lord the King, until the day of Easter in fifteen days, **[Nisi prius]** wheresoever the said Lord the King shall then be in England; unless the justices of the Lord the King assigned to take assises in the county aforesaid, shall have come before that time, to wit, on Monday the eighth day of March, at Reading in the said county, by the form of the statute [in that case provided], by reason of the default of the jurors, [summoned to appear as aforesaid.] At which day before the Lord the King, at Westminster, come the parties aforesaid by their attornies aforesaid; and the aforesaid justices of [*xi] *assise, before whom [the jury aforesaid came,] sent here their record before them, had in these words, to wit, **[Postea]** AFTERWARDS, at the day and place within contained, before Heneage Legger, Esquire, one of the Barons of the Exchequer of the Lord the King, and Sir John Eardley Wilmot, Knight, one of the justices of the said Lord the King, assigned to hold pleas before the King himself, justices of the said Lord the King, assigned to take assises in the county of Berks by the form of the statute [in that case provided,] come as well the within-named Richard Smith, as the within-written George Saunders, by their attornies within contained; and the jurors of the jury whereof mention is within made being called, certain of them, to wit, Charles Holloway, John Hooke, Peter Graham, Henry Cox, William Brown, and Francis Oakley, come, and are sworn upon that jury; and because the rest of the jurors of the same jury did not appear, **[Tales de circumstantibus]** therefore others of the by-standers being chosen by the sheriff, at the request of the said Richard Smith, and by the command of the justices aforesaid, are appointed anew, whose names are affixed to the panel within written, according to the form of the statute in such case made and provided; which said jurors so appointed anew, to wit, Roger Bacon, Thomas Small, Charles Pye, Edward Hawkins, Samuel Roberts, and Daniel Parker, being likewise called, come; and together with the other jurors aforesaid before impanelled and sworn, being elected, tried, and sworn, to speak the truth of the matter within contained, **[Verdict for the plaintiff]** upon their oath say, that the aforesaid George Saunders is guilty of the trespass and ejectment within-written, in manner and form as the aforesaid Richard Smith within complains against

him; and assess the damages of the said Richard Smith, on occasion of that trespass and ejectment, besides his costs and charges which he hath been put unto about his suit in that behalf, to twelve pence; and, for those costs and charges, to forty shillings. WHEREUPON the said Richard Smith, by his attorney aforesaid prayeth judgment against the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid; **[Motion in arrest of judgment]** and the said George Saunders, by his attorney aforesaid saith, that the court here ought not to proceed to give judgment upon the said verdict, and prayeth that judgment against him the said George Saunders, in and upon the verdict aforesaid by the jurors aforesaid given in the form aforesaid, may be stayed, by reason that the said verdict is insufficient and erroneous, and that the same verdict may be quashed, and that the issue aforesaid may be tried anew by other jurors to be afresh impanelled. **[Continuance]** And, because the court of the Lord the King here is not yet advised of giving their judgment of and upon the premises, therefore day thereof is given as well to the said Richard Smith as the said George Saunders, before the Lord the King, until the morrow of the Ascension of our Lord, wheresoever the said Lord [*xii] *the King shall then be in England, to hear their judgment of and upon the premises, for that the court of the Lord the King is not yet advised thereof. At which day before the Lord the King at Westminster, came the parties aforesaid by their attornies aforesaid; **[Opinion of the court]** upon which, the record and matters aforesaid having been seen, and by the court of the Lord the King now here fully understood, and all and singular the premises having been examined, and mature deliberation being had thereupon, for that it seems to the court of the Lord the King now here that the verdict aforesaid is in no wise insufficient or erroneous, and that the same ought not to be quashed, and that no new trial ought to be had of the issue aforesaid. **[Judgment, for the plaintiff]** THEREFORE IT IS CONSIDERED, that the said Richard do recover against the said George his term yet to come, of and in the said tenements, with the appurtenances, and the said damages assessed by the said jury in form aforesaid, **[Costs]** and also twenty-seven pounds six shillings and eight-pence for his costs and charges aforesaid, by the court of the Lord the King here awarded to the said Richard, with his assent, by way of increase; which said damages in the whole amount to twenty-nine pounds, seven shillings and eight-pence. **[Capiatur pro fine]** "And let the said George be taken, [until he maketh fine to the Lord the King]." † **[Writ of possession]** AND HEREUPON the said Richard, by his attorney aforesaid, prayeth a writ of the Lord the King, to be directed to the sheriff of the county aforesaid, to cause him to have possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances; and it is granted unto him, returnable before the Lord the King on the morrow of the Holy Trinity, wheresoever he shall then be in England. **[And return]** At which day before the Lord the King, at Westminster, cometh the said Richard, by his attorney aforesaid; and the sheriff, that is to say, Sir Thomas Reeve, Knight, now sendeth, that he by virtue of the writ aforesaid to him directed, on the ninth day of June last past, did cause the said Richard to have his possession of his term aforesaid yet to come, of and in the tenements aforesaid, with the appurtenances, as he was commanded.

† Now omitted.

[*xiii] *No. III.

Proceedings on an Action of Debt in the Court of Common Pleas; removed into the King's Bench by Writ of Error.

Sect. 1. *Original.*

[Praecipe] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. COMMAND Charles Long, late of Burford, gentleman, that justly and without delay he render to William Burton two hundred pounds, which he owes him and unjustly detains, as he saith. And unless he shall so do, and if the said William shall make you secure of prosecuting his claim, then summon by good summoners the aforesaid Charles, that he be before our justices, at Westminster, on the octave of Saint Hilary, to show wherefore he hath not done it. And have you there then the summoners, and this writ. WITNESS ourself at Westminster, the twenty-fourth day of December, in the twenty-eighth year of our reign.

Pledges of prosecution, { JOHN DOE, RICHARD ROE.

[Sheriff's return] Summoners of the within named Charles Long, { ROGER MORRIS, HENRY JOHNSON.

Sect. 2. *Process.*

[Attachment] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. [Pone] PUT by gage and safe pledges Charles Long, late of Burford, gentleman, that he be before our justices at Westminster, on the octave of the purification of the blessed Mary, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith; and to show wherefore he was not before our justices at Westminster on the octave of Saint Hilary, as he was summoned. And have there then the names of the pledges and this writ. WITNESS, Sir John Willes, Knight, at Westminster, the twenty-third day of January, in the twenty-eighth year of our reign.

[Sheriff's return] The within-named Charles Long is attached by Pledges, { EDWARD LEIGH. ROBERT TANNER.

[Distringas] [*xiv] *GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the sheriff of Oxfordshire, greeting. WE command you, that you distrein Charles Long, late of Burford, gentleman, by all his lands and chattels within your bailiwick, so that neither he nor any one through him may lay hands on the same, until you shall receive from us another command thereupon; and that you answer to us of the issues of the same; and that you have his body before our justices at Westminster from the day of Easter in fifteen days, to answer to William Burton of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, as he saith, and to hear his judgment of his many defaults. WITNESS, Sir John Wiles, Knight, at Westminster, the twelfth day of February, in the twenty-eighth year of our reign.

[Sheriff's return. Nihil] The within named Charles Long hath nothing in my bailiwick, whereby he may be distreined.

[Capias ad respondendum] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Oxfordshire greeting. WE command you, that you take Charles

Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster from the day of Easter in five weeks, to answer to William Burton, gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, that the said Charles hath nothing in your bailiwick, whereby he may be distreined. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the sixteenth day of April, in the twenty-eighth year of our reign.

[Sheriff's return. Non est inventus] The within named Charles Long is not found in my bailiwick.

[Testatum capias] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Berkshire, greeting. WE command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, Gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon our Sheriff of Oxfordshire hath made a return to our justices at Westminster, at a certain day now past, that the [*xv] *aforesaid Charles is not found in his bailiwick; and thereupon it is testified in our said Court, that the aforesaid Charles lurks, wanders, and runs about in your county. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

[Sheriff's return. Cepi corpus] By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

Or, upon the Return of Non est inventus *upon the first* Capias, *the Plaintiff may sue out an* Alias *and a* Pluries, *and thence proceed to Outlawry: thus:*

[Alias capias] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Oxfordshire greeting. WE command you as formerly we commanded you, that you take Charles Long, late of Burford, Gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, on the morrow of the Holy Trinity, to answer to William Burton, Gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the seventh day of May, in the twenty-eighth year of our reign.

[Sheriff's return. Non est inventus] The within named Charles Long is not found in my bailiwick.

[Pluries capias] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Oxfordshire greeting. WE command you, as we have more than once commanded you, that you take Charles Long, late of Burford, Gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before our justices at Westminster, from the day of the Holy Trinity in three weeks, to answer to William Burton, Gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the thirtieth day of May, in the twenty-eighth year of our reign.

[Sheriff's return. Non est inventus] The within named Charles Long is not found in my bailiwick.

[Exigi facias] [*xvi] *GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Oxfordshire greeting. WE command you, that you cause Charles Long, late of Burford, Gentleman, to be required from county court to county court, until, according to the law and custom of our realm of England, he be outlawed, if he doth not appear: and if he doth appear, then take him and cause him to be safely kept, so that you may have his body before our justices at Westminster, on the morrow of All Souls, to answer to William Burton, Gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith; and whereupon you have returned to our justices at Westminster, from the day of the Holy Trinity in three weeks, that he is not found in your bailiwick. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

[Sheriff's return] By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday the twenty-first day of June, in the twenty-ninth year of the reign of the Lord the King within written, [Primo exactus] the within named Charles Long was required the first time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty-fourth day of July in the year aforesaid, [Secundo exactus] the said Charles Long was required the second time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the twenty-first day of August in the year aforesaid, [Tertio exactus] the said Charles Long was required the third time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday, the eighteenth day of September in the year aforesaid, [Quarto exactus] the said Charles Long was required the fourth time, and did not appear: and at my county court held at Oxford aforesaid, on Thursday the sixteenth day of October in the year aforesaid, [Quinto exactus] the said Charles Long was required the fifth time, and did not appear: [Ideo utlagatus] therefore the said Charles Long, by the judgment of the coroners of the said Lord the King, of the county aforesaid, according to the law and custom of the kingdom of England, is outlawed.

[Writ of proclamation] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Oxfordshire, greeting. WHEREAS by our writ we have lately commanded you that you should cause Charles Long, late of Burford, Gentleman, to be required from county court to county court, until, according to [*xvii] *the law and custom of our realm of England he should be outlawed, if he did not appear: and if he did appear, then that you should take him and cause him to be safely kept, so that you might have his body before our justices at Westminster, on the morrow of All Souls, to answer to William Burton, Gentleman, of a plea, that he render to him two hundred pounds, which he owes him and unjustly detains, as he saith: THEREFORE we command you, by virtue of the statute in the thirty-first year of the Lady Elizabeth, late Queen of England, made and provided, that you cause the said Charles Long to be proclaimed upon three several days according to the form of that statute; (whereof one proclamation shall be made at or near the most usual door of the church of the parish wherein he inhabits) that he render himself unto you; so that you may have his body before our justices at Westminster at the day aforesaid, to answer the said William Burton of the plea aforesaid. And have you there then this writ. WITNESS, Sir John Willes, Knight, at Westminster, the eighteenth day of June, in the twenty-eighth year of our reign.

[Sheriff's return. Proclamari feci] By virtue of this writ to me directed, at my county court held at Oxford, in the county of Oxford, on Thursday the

twenty-sixth day of June, in the twenty-ninth year of the reign of the Lord the King within written, I caused to be proclaimed the first time; and at the general quarter sessions of the peace, held at Oxford aforesaid, on Tuesday the fifteenth day of July in the year aforesaid, I caused to be proclaimed the second time; and at the most usual door of the church of Burford within written, on Sunday the third day of August in the year aforesaid, immediately after divine service, one month at the least before the within named Charles Long was required the fifth time, I caused to be proclaimed the third time, that the said Charles Long should render himself unto me, as within it is commanded me.

[Capias utlagatum] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Berkshire greeting. WE command you, that you omit not by reason of any liberty of your county, but that you take Charles Long, late of Burford in the county of Oxford, Gentleman, (being outlawed in the said county of Oxford, on Thursday the sixteenth day of October last past, at the suit of William Burton, Gentleman, of a plea of debt, as the Sheriff of Oxfordshire aforesaid returned to our justices at Westminster on the morrow of All Souls then next ensuing) if the said Charles Long may be found in your bailiwick; and him safely keep, so that you may [*xviii] *have his body before our justices at Westminster from the day of St. Martin in fifteen days to do and receive what our Court shall consider concerning him in this behalf. WITNESS, Sir John Willes, Knight, at Westminster, the sixth day of November, in the twenty-ninth year of our reign.

[Sheriff's return. Cepi corpus] By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

Sect. 3. †*Bill of* MIDDLESEX, *and* LATITAT *thereupon in the Court of* KING'S BENCH.

to wit. } **[Bill of Middlesex for trespass]** THE SHERIFF is commanded
Middlesex, } that he take Charles Long, late of Burford, in the county of Oxford, if he may be found in his bailiwick, and him safely keep, so that he may have his body before the Lord the King at Westminster, on Wednesday next after fifteen days of Easter, to answer William Burton, Gentleman, of a plea of trespass; **[Ac etiam in debt]** [AND ALSO to a bill of the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of the court of the said Lord the King, before the King himself to be exhibited;] and that he have there then this precept.

[Sheriff's return. Non est inventus] The within named Charles Long is not found in my bailiwick.

[Latitat] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Berkshire, greeting. WHEREAS we lately commanded our Sheriff of Middlesex that he should take Charles Long, late of Burford, in the county of Oxford, if he might be found in his bailiwick, and him safely keep, so that he might be before us at Westminster, at a certain day now past, to answer unto William Burton, Gentleman, of a plea of trespass; **[Ac etiam]** [AND ALSO to a bill of

† Note, that sect. 3. and 4. are the usual method of process, to compel an appearance in the Courts of King's Bench and Exchequer; in which the practice of those courts does principally differ from that of the Court of Common Pleas; the subsequent stages of proceeding being nearly alike in them all.

the said William against the aforesaid Charles, for two hundred pounds of debt, according to the custom of our court, before us to be exhibited;] and our said Sheriff of Middlesex at that day returned to us that the aforesaid Charles was not found in his bailiwick; whereupon on the behalf of the aforesaid William in our court before us it is sufficiently attested that the aforesaid Charles lurks and runs about in your county: THEREFORE we command you, that you take him, if he may be found in [*xix] *your bailiwick, and him safely keep, so that you may have his body before us at Westminster, on Tuesday next after five weeks of Easter, to answer the aforesaid William of the plea [and bill] aforesaid; and have you there then this writ. WITNESS, Sir Dudley Ryder, Knight, at Westminster, the eighteenth day of April, in the twenty-eighth year of our reign.

[Sheriff's return. Cepi corpus] By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready at the day and place within contained, according as by this writ it is commanded me.

Sect. 4. *Writ of* QUO MINUS *in the* EXCHEQUER.

GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to the Sheriff of Berkshire, greeting. WE command you, that you omit not by reason of any liberty of your county, but that you enter the same, and take Charles Long, late of Burford, in the county of Oxford, Gentleman, wheresoever he shall be found in your bailiwick, and him safely keep, so that you may have his body before the Barons of our Exchequer at Westminster, on the morrow of the Holy Trinity, to answer William Burton, our debtor of a plea, that he render to him two hundred pounds which he owes him and unjustly detains, whereby he is the less able to satisfy us the debts which he owes us at our said Exchequer, as he saith he can reasonably show that the same he ought to render: and have you there this writ. WITNESS, Sir Thomas Parker, Knight, at Westminster, the sixth day of May, in the twenty-eighth year of our reign.

[Sheriff's return. Cepi corpus] By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready before the barons within written, according as within it is commanded me.

Sect. 5. *Special Bail, on the Arrest of the Defendant, pursuant to the* TESTATUM CAPIAS, *in page* xiv.

[Bail bond to the sheriff] KNOW ALL MEN by these presents, that we Charles Long, of Burford, in the county of Oxford, Gentleman, Peter Hamond, of Bix, in the said county, Yeoman, and Edward Thomlinson, of Woodstock, in the said county, innholder, are held and firmly bound to Christopher Jones, Esquire, Sheriff of the County of Berks, in four hundred pounds of lawful money of Great Britain, to be paid to the said sheriff, or his certain attorney, executors, administrators, or assigns; for which payment well and truly to be made, we bind ourselves and each of us by himself [*xx] *for the whole and in gross, our and every of our heirs, executors, and administrators, firmly by these presents, sealed with our seals. Dated the fifteenth day of May, in the twenty-eighth year of the reign of our sovereign Lord George the Second, by the grace of God, King of Great Britain, France, and Ireland, Defender of the Faith, and so forth, and in the year of our Lord one thousand seven hundred and fifty-five.

[Condition] THE CONDITION of this obligation is such, that if the above bounden Charles Long do appear before the justices of our sovereign Lord the King, at Westminster, on the morrow of the Holy Trinity, to answer William

Burton, Gentleman, of a plea of debt of two hundred pounds, then this obligation shall be void and of none effect, or else shall be and remain in full force and virtue.

Sealed and delivered, being first duly stamped, in the presence of
HENRY SHAW.
TIMOTHY GRIFFITH

CHARLES LONG. (L. S.)
PETER HAMOND. (L. S.)
EDWARD THOMLINSON. (L. S.)

[Recognizance of bail before the commission] YOU Charles Long do acknowledge to owe unto the plaintiff four hundred pounds, and you John Rose and Peter Hammond do severally acknowledge to owe unto the same person the sum of two hundred pounds a piece, to be levied upon your several goods and chattels, lands and tenements, UPON CONDITION that, if the defendant be condemned in the action, he shall pay the condemnation, or render himself a prisoner in the Fleet for the same; and, if he fail so to do, you John Rose and Peter Hammond do undertake to do it for him.

Trinity Term, 28 Geo. II.

[Bail piece.]

Berks, *to wit.* } ON a *Testatum Capias* from Oxfordshire against Charles Long, late of Burford in the county of Oxford, Gentleman, returnable on the morrow of the Holy Trinity, at the suit of William Burton, of a plea of debt of two hundred pounds:

THE BAIL are, John Rose, of Witney, in the county of Oxford, Esquire, Peter Hamond of Bix, in the said county, yeoman.

RICHARD PRICE, attorney for the defendant,

The party himself in 400*l.*
Each of the bail in 200*l.*

Taken and acknowledged the twenty-eighth day of May, in the year of our Lord one thousand seven hundred and fifty-five, *de bene esse*, before me,
ROBERT GROVE,
one of the commissioners.

[*xxi] *Sect. 6. *The Record, as removed by Writ of* ERROR.

[Writ of error] THE LORD the King hath given in charge to his trusty and beloved Sir John Willes, Knight, his writ closed in these words:—GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth; to our trusty and beloved Sir John Willes, Knight, greeting. BECAUSE in the record and process, and also in the giving of judgment of the plaint, which was in our Court before you and your fellows, our justices of the bench, by our writ, between William Burton, Gentleman, and Charles Long, late of Burford in the county of Oxford, Gentlemen, of a certain debt of two hundred pounds, which the said William demands of the said Charles, manifest error hath intervened, to the great damage of him the said William, as we from his complaint are informed; we being willing that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf, do command you, that if judgment thereof be given, then under your seal you do distinctly and openly send the record and process of the plaint aforesaid, with all things concerning them, and this writ; so that we may have them

from the day of Easter in fifteen days, wheresoever we shall then be in England; that the record and process aforesaid being inspected, we may cause to be done thereupon for correcting that error, what of right and according to the law and custom of our realm of England ought to be done. WITNESS ourselves at Westminster, the twelfth day of February, in the twenty-ninth year of our reign.

[Chief justice's return] THE record and process whereof in the said writ mention above is made, follow in these words to wit:—

[The record] PLEAS at Westminster before Sir John Willes, Knight, and his brethern, justices of the bench of the Lord the King at Westminster, of the term of the Holy Trinity, in the twenty-eighth year of the reign of the Lord GEORGE the Second, by grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, &c.

[Writ] *Oxon*, *to wit.* CHARLES LONG, late of Burford in the county aforesaid, Gentleman, was summoned to answer William Burton, of Yarnton in the said county, Gentleman, of a plea that he render unto him two hundred pounds, which he owes him and unjustly detains, [as he saith.] [Declaration, or count, on a bond.] AND WHEREUPON the said William, by Thomas Gough, his attorney, complains, that whereas on the first day of December, in the year of our Lord [*xxii] *one thousand seven hundred and fifty-four, at Banbury in this county, the said Charles by his writing obligatory did acknowledge himself to be bound to the said William in the said sum of two hundred pounds of lawful money of Great Britain, to be paid to the said William, whenever after the said Charles should be thereto required; nevertheless the said Charles (although often required) hath not paid to the said William the said sum of two hundred pounds, nor any part thereof, but hitherto altogether hath refused, and doth still refuse to render the same; wherefore he saith that he is injured, and hath damage to the value of ten pounds: and thereupon he brings suit, [and good proof.] [Profert in curia.] AND he brings here into Court the writing obligatory aforesaid; which testifies the debt aforesaid in form aforesaid; the date whereof is the day and year before mentioned. [Defence] AND the aforesaid Charles, by Richard Price his attorney, comes and defends the force and injury when [and where it shall behove him,] and craves oyer of the said writing obligatory, and it is read unto him [in the form aforesaid:] [Oyer prayed of the bond and condition, viz., to perform an award] he likewise craves oyer of the condition of the said writing, and it is read unto him in these words:—"The condition of this obligation is such, that if the above bounden Charles Long, his heirs, executors, and administrators, and every of them, shall and do from time to time, and at all times hereafter, well and truly stand to, obey, observe, fulfil, and keep, the award, arbitrament, order, rule, judgment, final end, and determination, of David Stiles, of Woodstock, in the said county, clerk, and Henry Bacon, of Woodstock aforesaid, Gentleman, (arbitrators indifferently nominated and chosen by and between the said Charles Long and the above-named William Burton, to arbitrate, award, order, rule, judge, and determine, of all and all manner of actions, cause or causes of action, suits, plaints, debts, duties, reckonings, accounts, controversies, trespasses, and demands whatsoever had, moved, or depending, or which might have been had, moved, or depending, by and between the parties, for any matter, cause, or thing, from the beginning of the world until the day of the date hereof,) which the said arbitrators shall make and publish, of or in the premises, in writing under their hands and seals, or otherwise by word of mouth, in the presence of two credible witnesses, on or before the first day of January next ensuing the date hereof; then this obligation to be void and of none effect, or else to be and remain in full force and virtue." [Imparlance] WHICH being read and heard, the said Charles prays leave to imparl therein here until the octave of the Holy Trinity; and it is granted unto him. [Continuance] The same day is given to the said

William Burton, here, &c. At which day, to wit, on the octave of the Holy Trinity, here come as well the said William Burton as the said Charles Long, by their attorneys aforesaid: and hereupon the said William [*xxiii] *prays that the said Charles may answer to his writ and count aforesaid. [Plea; No such award] AND the aforesaid Charles defends the force and injury, when, &c. and saith, that the said William ought not to have or maintain his said action against him; because he saith, that the said David Stiles and Henry Bacon, the arbitrators beforenamed in the said condition, did not make any such award, arbitrament, order, rule, judgment, final end, or determination, of or in the premises above specified in the said condition, on or before the first day of January, in the condition aforesaid above mentioned, according to the form and effect of the said condition: and this he is ready to verify. Wherefore he prays judgment, whether the said William ought to have or maintain his said action thereof against him [and that he may go thereof without a day.] [Replication, setting forth an award] AND the aforesaid William saith, that for any thing above alleged by the said Charles in pleadings, he ought not to be precluded from having his said action thereof against him; because he saith, that after the making of the said writing obligatory, and before the said first day of January, to wit, on the twenty-sixth day of December, in the year aforesaid, at Banbury aforesaid, in the presence of two credible witnesses, namely, John Dew, of Chalbury, in the county aforesaid, and Richard Morris, of Wytham, in the county of Berks, the said arbitrators undertook the charge of the award, arbitrament, order, rule, judgment, final end, and determination aforesaid, of and in the premises specified in the condition aforesaid; and then and there made and published their award by word of mouth in manner and form following, that is to say, the said arbitrators did award, order, and adjudge, that he the said Charles Long should forthwith pay to the said William Burton the sum of seventy-five pounds, and that thereupon all differences between them at the time of the making the said writing obligatory should finally cease and determine. And the said William further saith, that although he afterwards, to wit, on the sixth day of January, in the year of our Lord one thousand seven hundred and fifty-five, at Banbury aforesaid, requested the said Charles to pay to him the said William the said seventy-five pounds, yet [Protestando] (by protestation that the said Charles hath not stood to, obeyed, observed, fulfilled, or kept any part of the said award, which by him the said Charles ought to have been stood to, obeyed, observed, fulfilled, and kept,) for further plea therein he saith, that the said Charles the said seventy-five pounds to the said William hath not hitherto paid; and this he is ready to verify. Wherefore he prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of the said debt, to be adjudged unto him, &c. [Demurrer] AND the aforesaid Charles saith, that the plea aforesaid, by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are in no wise sufficient in [*xxiv] *law for the said William to have or maintain his action aforesaid thereupon against him the said Charles; to which the said Charles hath no necessity, neither is he obliged by the law of the land, in any manner to answer; and this he is ready to verify. Wherefore, for want of a sufficient replication in this behalf, the said Charles, as aforesaid, prays judgment, and that the aforesaid William may be precluded from having his action aforesaid thereupon against him, &c. [Causes of demurrer] AND the said Charles, according to the form of the statute in that case made and provided, shows to the court here the causes of demurrer following: to wit, that it doth not appear, by the replication aforesaid, that the said arbitrators made the same award in the presence of two credible witnesses on or before the said first day of January, as they ought to have done, according to the form and effect of the condition aforesaid; and that the replication aforesaid is uncertain, insufficient, and wants form. [Joinder in demurrer.] AND the aforesaid William saith, that the plea aforesaid by him the said William in manner and form aforesaid above in his replication pleaded, and the matter in the same contained, are

good and sufficient in law for the said William to have and maintain the said action of him the said William thereupon against the said Charles; which said plea, and the matter therein contained, the said William is ready to verify and prove as the court shall award: and because the aforesaid Charles hath not answered to that plea, nor hath he hitherto in any manner denied the same, the said William as before prays judgment, and his debt aforesaid, together with his damages occasioned by the detention of that debt, to be adjudged unto him, &c. [Continuances] AND BECAUSE the justices here will advise themselves of and upon the premises before they give judgment thereupon, a day is thereupon given to the parties aforesaid here, until the Morrow of All Souls, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said Charles as the said William, by their said attorneys; and because the said justices here will farther advise themselves of and upon the premises before they give judgment thereupon, a day is farther given to the parties aforesaid here until the octave of Saint Hilary, to hear their judgment thereupon, for that the said justices here are not yet advised thereof. At which day here come as well the said William Burton as the said Charles Long, by their said attornies. [Opinion of the court] WHEREFORE, the record and matters aforesaid having been seen, and by the justices here fully understood, and all and singular the premises being examined, and mature deliberation being had thereupon; for that it seems to the said justices here, [Replication insufficient] that the said plea of the said William Burton before in his replication pleaded, and the matter therein contained, are not sufficient in law, to have and maintain the action of the aforesaid William against the aforesaid Charles; [Judgment for the defendant. Querens nihil capiat per breve] THEREFORE IT IS CONSIDERED, that the aforesaid William [*xxv] *take nothing by his writ aforesaid, [Amercement. Costs] but that he and his pledges of prosecuting, to wit, John Doe and Richard Roe, be in mercy for his false complaint; and that the aforesaid Charles go thereof without a day, &c. AND IT IS FARTHER CONSIDERED, that the aforesaid Charles do recover against the aforesaid William eleven pounds and seven shillings, for his costs and charges by him about his defence in this behalf sustained, adjudged by the court here to the said Charles with his consent, according to the form of the statute in that case made and provided: [Execution] and that the aforesaid Charles may have execution thereof, &c.

[General error assigned] AFTERWARDS, to wit, on Wednesday next after fifteen days of Easter in this same term before the Lord the King, at Westminster, comes the aforesaid William Burton, by Peter Manwaring, his attorney, and saith, that in the record and process aforesaid, and also in the giving of the judgment in the plaint aforesaid, it is manifestly erred in this; to wit, that the judgment aforesaid was given in form aforesaid for the said Charles Long against the aforesaid William Burton, where by the law of the land judgment should have been given for the said William Burton against the said Charles Long; and this he is ready to verify. [Writ of scire facias, to hear errors] AND the said William prays the writ of the said Lord the King, to warn the said Charles Long to be before the said Lord the King, to hear the record and process aforesaid; and it is granted unto him; by which the sheriff aforesaid is commanded that by good [and lawful men of his bailiwick] he cause the aforesaid Charles Long to know, that he be before the Lord the King from the day of Easter in five weeks, wheresoever [he shall then be in England,] to hear the record and process aforesaid, if [it shall have happened that in the same any error shall have intervened;] and farther [to do and receive what the court of the Lord the King shall consider in this behalf.] The same day is given to the aforesaid William Burton. AT WHICH DAY before the Lord the King at Westminster, comes the aforesaid William Burton, by his attorney aforesaid; [Sheriff's return; Scire feci] and the sheriff returns, that by virtue of the writ aforesaid to him directed, he had caused the said Charles Long to know, that he be before the Lord the King at the time aforesaid in the said

writ contained, by John Den and Richard Fen, good, &c., as by the same writ was commanded him; which said Charles Long, according to the warning given him in this behalf, here cometh by Thomas Webb, his attorney. [**Error as signed afresh**] WHEREUPON the said William saith, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, alleging the error aforesaid by him in the form aforesaid alleged, and prays, that the judgment aforesaid for the error aforesaid, and others, in the record and process aforesaid being, may be reversed, annulled, and entirely for nothing esteemed, and that the said Charles [*xxvi] *may rejoin to the errors aforesaid, and that the court of the said Lord the King here may proceed to the examination as well of the record and process aforesaid, as of the matter aforesaid above for error assigned. [**Rejoinder; In nullo est erratum**] AND the said Charles saith, that neither in the record and process aforesaid, nor in the giving of the judgment aforesaid, in any thing is there erred; and he prays in like manner that the court of the said Lord the King here may proceed to the examination as well of the record and process aforesaid, as of the matters aforesaid above for error assigned. [**Continuance**] AND BECAUSE the court of the Lord the King here is not yet advised what judgment to give of and upon the premises, a day is thereof given to the parties aforesaid until the morrow of the Holy Trinity, before the Lord the King, wheresoever he shall then be in England, to hear their judgment of and upon the premises, for that the court of the Lord the King here is not yet advised thereof. At which day before the Lord the King, at Westminster, come the parties aforesaid by their attornies aforesaid: [**Opinion of the court**] WHEREUPON, as well the record and process aforesaid, and the judgment thereupon given, as the matters aforesaid by the said William above for error assigned, being seen, and by the court of the Lord the King here being fully understood, and mature deliberation being thereupon had, for that it appears to the court of the Lord the King here, that in the record and process aforesaid, and also in the giving of the judgment aforesaid, it is manifestly erred, [**Judgment of the Common Pleas reversed. Judgment for the Plaintiff. Costs. Defendant amerced**] THEREFORE IT IS CONSIDERED, that the judgment aforesaid, for the error aforesaid, and others, in the record and process aforesaid. be reversed, annulled, and entirely for nothing esteemed; and that the aforesaid William recover against the aforesaid Charles his debt aforesaid, and also fifty pounds for his damages which he hath sustained, as well on occasion of the detention of the said debt, as for his costs and charges unto which he hath been put about his suit in this behalf, to the said William with his consent by the court of the Lord the King here adjudged. And the said Charles in mercy.

Sect. 7. *Process of Execution.*

[**Writ of capias ad satisfaciendum**] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the Sheriff of Oxfordshire greeting. WE command you, that you take Charles Long, late of Burford, gentleman, if he may be found in your bailiwick, and him safely keep, so that you may have his body before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to satisfy William Burton, for two hundred pounds debt, which the said William Burton hath lately recovered against him in our court before us, and also fifty pounds, which were [*xxvii] *adjudged in our said court before us to the said William Burton, for his damages which he hath sustained, as well by occasion of the detention of the said debt, as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have you there then this writ. WITNESS, Sir Thomas Denison,† Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

† The senior puisne justice; there being no chief justice that term.

[Sheriff's return; Cepi Corpus] By virtue of this writ to me directed, I have taken the body of the within named Charles Long; which I have ready before the Lord the King at Westminster, at the day within written, as within it is commanded me.

[Writ of Fieri facias] GEORGE the Second, by the grace of God, of Great Britain, France, and Ireland King, Defender of the Faith, and so forth, to the Sheriff of Oxfordshire greeting. WE command you that of the goods and chattels within your bailiwick of Charles Long, late of Burford, gentleman, you cause to be made two hundred pounds debt, which William Burton lately in our court before us at Westminster hath recovered against him, and also fifty pounds, which were adjudged in our court before us to the said William, for his damages which he hath sustained, as well by occasion of the detention of his said debt, as for his costs and charges to which he hath been put about his suit in this behalf, whereof the said Charles Long is convicted, as it appears to us of record; and have that money before us in three weeks from the day of the Holy Trinity, wheresoever we shall then be in England, to render to the said William of his debt and damages aforesaid; and have there then this writ. WITNESS, Sir Thomas Denison, Knight, at Westminster, the nineteenth day of June, in the twenty-ninth year of our reign.

[Sheriff's return; Fieri feci] By virtue of this writ to me directed, I have caused to be made of the goods and chattels of the within written Charles Long, two hundred and fifty pounds; which I have ready before the Lord the King at Westminster, at the day within written, as it is within commanded me.

APPENDIX TO BOOK IV.

Sect. 1. Record of an Indictment and Conviction of Murder, at the Assizes.

Warwickshire, } [Session of oyer and terminer] Be it remembered, that at
to wit, } the general session of the lord the king of *oyer* and *terminer* holden at Warwick in and for the said county of Warwick, on Friday the twelfth day of March in the second year of the reign of the lord George the third, now king of Great Britain, before sir Michael Foster, knight, one of the justices of the said lord the king assigned to hold pleas before the king himself, sir Edward Clive, knight, one of the justices of the said lord the king, of his court of Common Bench, and others their fellows. [Commission of oyer and terminer, and of the peace] justices of the said lord the king, assigned by letters patent of the said lord the king, under his great seal of Great Britain, made to them the aforesaid justices and others, and any two or more of them, (whereof one of them the said sir Michael Foster and sir Edward Clive, the said lord the king would have to be one) to inquire (by the oath of good and lawful men of the county aforesaid, by whom the truth of the matter might be the better known, and by other ways, methods, and means, whereby they could or might the better know, as well within liberties as without (more fully the truth of all treasons, misprisions of treasons, insurrections, rebellions, counterfeitings, clippings, washings, false coinings, and other falsities of the monies of Great Britain, and of other kingdoms or dominions whatsoever; and of all murders, felonies, manslaughters, killings, burglaries, rapes of women, unlawful meetings and conventicles, unlawful uttering of words, unlawful assemblies, misprisions, confederacies, false allegations, trespasses, riots, routs, retentions, escapes, contempts, falsities, negligences, concealments, maintenancees, oppressions, champarties, deceits, and all other misdeeds, offences, and injuries whatsoever, and also the accessaries of the same, within the county aforesaid, as well within liberties as without, by whomsoever and howsoever done, had, perpetrated, and committed, and by whom, to whom, when, how, and in what manner; and of all other articles and circumstances in the said letters patent of the said lord the king specified; the premises and every or any of them howsoever concerning; and for this time to hear and determine the said treasons and other the premises, according to the law and custom of the realm of England; and also keepers of the peace, and justices of the said lord the king, assigned to hear and determine divers felonies, trespasses, and other misdemeanors committed within the county aforesaid, by the oath of [Grand jury] sir James Thomson, baronet, Charles Roper, Henry Dawes, Peter Wilson, Samuel Rogers, John Dawson, James Phillips, John Mayo, Richard Savage, William Bell, James Morris, Laurence Hall, and Charles Carter, esquires, good and lawful men of the county aforesaid, then and there impanelled, sworn, and charged to inquire for the said lord the king and for the body of the said county, it is presented; [Indictment] That Peter Hunt, late of the parish of Lighthorne in the said county, gentleman, not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil, on the fifth day of March in the said second year of the reign of the said lord the king, at the parish of Lighthorne aforesaid, with force and arms, in and upon one Samuel Collins, in the peace of God and of the said lord the king then and there being, feloniously, wilfully, and of his malice aforethought, did

make an assault; and that the said Peter Hunt, with a certain drawn sword, made of iron and steel, of the value of five shillings, which he the said Peter Hunt in his right hand then and there had and held, him the said Samuel Collins, in and upon the left side of the belly of him the said Samuel Collins then and there feloniously, wilfully, and of his malice aforethought, did strike, thrust, stab, and penetrate; giving unto the said Samuel Collins, then and there, with the sword drawn as aforesaid, in and upon the left side of the belly of him the said Samuel Collins, one mortal wound of the breadth of one inch, and the depth of nine inches; of which said mortal wound he the said Samuel Collins, at the parish of Lighthorne aforesaid in the said county of Warwick, from the said fifth day of March in the year aforesaid until the seventh day of the same month in the same year, did languish, and languishing did live; on which said seventh day of March in the year aforesaid, the said Samuel Collins, at the parish of Lighthorne aforesaid, in the county aforesaid, of the said mortal wound did die: and so the jurors aforesaid, upon their oath aforesaid, do say, that the said Peter Hunt him the said Samuel Collins, in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder, against the peace of the said lord the now king, his crown, and dignity. **[Capias]** WHEREUPON the sheriff of the county aforesaid is commanded, that he omit not for any liberty in his bailiwick, but that he take the said Peter Hunt, if he may be found in his bailiwick, and him safely keep, to answer to the felony and murder whereof he stands indicted. **[Session of gaol delivery]** WHICH said indictment the said justices of the lord the king above named, afterwards, to wit, at the delivery of the goal of the said lord the king, holden at Warwick in and for the county aforesaid, on Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the right honourable William lord Mansfield, chief justice of the said lord the king, assigned to hold pleas before the king himself, sir Sidney Stafford Smythe, knight, one of the barons of the exchequer of the said lord the king, and others their fellows, justices of the said lord the king, assigned to deliver his said goal of the county aforesaid of the prisoners therein being, by their proper hands do deliver here in court of Record in form of the law to be determined. **[Arraignment]** AND AFTERWARDS, to wit, at the same delivery of the gaol of the said lord the king of his county aforesaid, on the said Friday the sixth day of August, in the said second year of the reign of the said lord the king, before the said justices of the lord the king last above named and others their fellows aforesaid, here cometh the said Peter Hunt, under the custody of William Browne, esquire, sheriff of the county aforesaid, (in whose custody in the gaol of the county aforesaid, for the cause aforesaid, he had been before committed,) being brought to the bar here in his proper person by the said sheriff, to whom he is here also committed: **[Plea: not guilty]** AND forthwith being demanded concerning the premises in the said indictment above specified and charged upon him, how he will acquit himself thereof, he saith, that he is not guilty thereof; and thereof for good and evil he puts himself upon the country: **[Issue]** AND John Blencowe, esquire, clerk of the assizes for the county aforesaid, who prosecutes for the said lord the king in this behalf, doth the like: **[Venire]** THEREFORE let a jury thereupon here immediately come before the said justices of the lord the king last above mentioned, and others their fellows aforesaid, of free and lawful men of the neighbourhood of the said parish of Lighthorne in the county of Warwick aforesaid, by whom the truth of the matter may be the better known, and who are not of kin to the said Peter Hunt, to recognise upon their oath, whether the said Peter Hunt be guilty of the felony and murder in the indictment aforesaid above specified, or not guilty: because as well the said John Blencowe, who prosecutes for the said lord the king in this behalf, as the said Peter Hunt, have put themselves upon the said jury. And the jurors of the said jury by the said sheriff for this purpose impanelled and returned, to wit, David Williams, John Smith, Thomas Horne, Charles Nokes, Richard May, Walter Duke, Matthew Lion, James White, William Bates, Oliver Green, Bartholomew

Nash, and Henry Long, being called, come; who being elected, tried, and sworn, to speak the truth of and concerning the premises, upon their oath say, [Verdict: guilty of murder] THAT the said Peter Hunt is guilty of the felony and murder aforesaid, on him above charged in the form aforesaid, as by the indictment aforesaid is above supposed against him; and that the said Peter Hunt at the time of committing the said felony and murder, or at any time since to this time, had not nor hath any goods or chattels, lands or tenements, in the said county of Warwick, or elsewhere, to the knowledge of the said jurors.[1] And upon this it is forthwith demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: who nothing further saith, unless as he before had said. [Judgment of death, etc.] WHEREUPON, all and singular the premises being seen, and by the said justices here fully understood, IT IS CONSIDERED by the court here, that the said Peter Hunt be taken to the gaol of the said lord the king of the said county of Warwick from whence he came, and from thence to the place of execution on Monday now next ensuing, being the ninth day of this instant August, and there be hanged by the neck until he be dead; and that afterwards his body be dissected and anatomized.

SECT. 2. CONVICTION OF MANSLAUGHTER.

[Verdict: not guilty of murder; guilty of manslaughter] —— upon their oath say, that the said Peter Hunt is not guilty of the murder aforesaid, above charged upon him; but that the said Peter Hunt is guilty of the felonious slaying of the aforesaid Samuel Collins; and that he had not nor hath any goods or chattels, lands or tenements, at the time of the felony and manslaughter aforesaid, or ever afterwards to this time, to the knowledge of the said jurors.[2] And immediately it is demanded of the said Peter Hunt, if he hath or knoweth any thing to say, wherefore the said justices here ought not upon the premises and verdict aforesaid to proceed to judgment and execution against him: [Clergy prayed] WHO saith that he is a clerk, and prayeth the benefit of clergy to be allowed him in this behalf [Judgment to be burned in the hand, and delivered] WHEREUPON, all and singular the premises being seen, and by the said justices here fully understood, IT IS CONSIDERED by the court here, that the said Peter Hunt be burned in his left hand, and delivered. And immediately he is burned in his left hand, and is delivered, according to the form of the statute.[3]

SECT. 3. ENTRY OF A TRIAL INSTANTER IN THE COURT OF KING'S BENCH, UPON A COLLATERAL ISSUE; AND RULE OF COURT FOR EXECUTION THEREON.

Michaelmas Term, in the Sixth Year of the Reign of King George the Third.

Kent; The King against Thomas Rogers. } [Habeas corpus. Record of attainder read; of felony and robbery] THE PRISONER at the bar being brought into this court in custody of the sheriff of the county of Sussex, by virtue of his majesty's writ of *habeas corpus*, IT IS ORDERED that the said writ and the return thereto be filed. AND it appearing by a certain record of attainder, which hath been removed into this court by his majesty's writ of *certiorari*, that the prisoner at the bar stands attainted, by the name of

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[1] This averment is now rendered unnecessary. See 7 and 8 Geo. IV. c. 28, § 5; ante, p. 387, n. (7).

[2] See preceding note.

[3] Benefit of clergy and burning in the hand being now abolished, see 6 Geo. IV. c. 25, 7 and 8 Geo. IV. c. 28, ante, p. 374, n. (8), this form will require alteration accordingly.

Thomas Rogers, of felony for a robbery on the highway, and the said prisoner at the bar having heard the record of the said attainder now read to him, [Prisoner asked what he can say in bar of execution] is now asked by the court here, what he hath to say for himself, why the court here should not proceed to award execution against him upon the said attainder. [Plea; not the same person] HE for plea saith, that he is not the same Thomas Rogers in the said record of attainder, named, and against whom judgment was pronounced: and this he is ready to verify and prove, &c. To which said plea the honourable Charles Yorke, esquire, attorney general of our present sovereign lord the king, who for our said lord the king in this behalf prosecuteth, being now present here in court, and having heard what the said prisoner at the bar hath now alleged, for our said lord the king [Replication; averring that he is] by way of reply saith, that the said prisoner now here at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was pronounced as aforesaid; and this he prayeth may be inquired into by the country; [Issue joined] and the said prisoner at the bar doth the like: [Venire awarded instanter] THEREFORE let a jury in this behalf immediately come here into court, by whom the truth of the matter will be the better known, and who have no affinity to the said prisoner, to try upon their oath, whether the said prisoner at the bar be the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, or not: because as well the said Charles Yorke, esquire, attorney general of our said lord the king, who for our said lord the king in this behalf prosecutes, as the said prisoner at the bar, have put themselves in this behalf upon the said jury. [Jury sworn] AND immediately thereupon the said jury come here into court: and being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, and having heard the said record read to them, [Verdict: that he is the same] do say upon their oath, that the said prisoner at the bar is the same Thomas Rogers in the said record of attainder named, and against whom judgment was so pronounced as aforesaid, in manner and form as the said attorney general hath by his said replication to the said plea of the said prisoner now here at the bar alleged. AND HEREUPON the said attorney general on behalf of our said lord the king now prayeth, that the court here would proceed to award execution against him the said Thomas Rogers upon the said attainder. [Award of execution] WHEREUPON, all and singular the premises being now seen and fully understood by the court here, IT IS ORDERED by the court here, that execution be done upon the said prisoner at the bar for the said felony in pursuance of the said judgment, according to due form of law: AND it is lastly ordered, that he the said Thomas Rogers, the prisoner at the bar, be now committed to the custody of the sheriff of the county of Kent (now also present here in court) for the purpose aforesaid; and that the said sheriff of Kent do execution upon the said defendant the prisoner at the bar for the said felony, in pursuance of the said judgment, according to due form of law. On the motion of Mr. Attorney General.

By the Court.

SECT. 4. WARRANT OF EXECUTION ON JUDGMENT OF DEATH, AT THE GENERAL GAOL DELIVERY IN LONDON AND MIDDLESEX.

London and Middlesex. } To the sheriffs of the city of London; and to the sheriff of the county of Middlesex: and to the keeper of his majesty's gaol of Newgate.

WHEREAS at the session of gaol delivery of Newgate, for the city of London and county of Middlesex, holden at Justice Hall in the Old Bailey, on the nineteenth day of October last, Patrick Mahony, Roger Jones, Charles King, and Mary Smith, received sentence of death for the respective offences in their several indictments mentioned; NOW IT IS HEREBY ORDERED, that execution of the said sentence be made and done upon them the said Patrick Mahony and

Roger Jones, on Wednesday the ninth day of this instant month of November at the usual place of execution. AND it is his majesty's command, that execution of the said sentence upon them the said Charles King and Mary Smith be respited, until his majesty's pleasure touching them be further known.

GIVEN under my hand and seal this fourth day of November, one thousand seven hundred and sixty-eight.

JAMES EYRE, Recorder, (L. S.)

SECT. 5. WRIT OF EXECUTION UPON A JUDGMENT OF MURDER, BEFORE THE KING IN PARLIAMENT.

GEORGE the Second, by the grace of God of Great Britain, France, and Ireland, king, defender of the faith, and so forth; to the sheriffs of London and sheriff of Middlesex, greeting. WHEREAS Lawrence earl Ferrers, viscount Tamworth, hath been indicted of felony and murder by him done and committed, which said indictment hath been certified before us in our present parliament; and the said Lawrence earl Ferrers, viscount Tamworth, hath been thereupon arraigned, and upon such arraignment hath pleaded not guilty; and the said Lawrence earl Ferrers, viscount Tamworth, hath before us in our parliament been tried, and in due form of law convicted thereof; and whereas judgment hath been given in our said parliament, that the said Lawrence earl Ferrers, viscount Tamworth, shall be hanged by the neck till he is dead, and that his body be dissected and anatomized, the exeecution of which judgment yet remaineth to be done: WE require, and by these presents strictly command you, that upon Monday the fifth day of May instant, between the hours of nine in the morning and one in the afternoon of the same day, him the said Lawrence earl Ferrers, viscount Tamworth, without the gate of our tower of London (to you then and there to be delivered, as by another writ to the lieutenant of our tower of London or to his deputy directed, we have commanded) into your custody you then and there receive: and him, in your custody so being, you forthwith convey to the accustomed place of execution at Tyburn: and that you do cause execution to be done upon the said Lawrence earl Ferrers, viscount Tamworth, in your custody so being, in all things according to the said judgment. And this you are by no means to omit, at your peril. WITNESS ourself at Westminster the second day of May, in the thirty-third year of our reign.

YORKE and YORKE.

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